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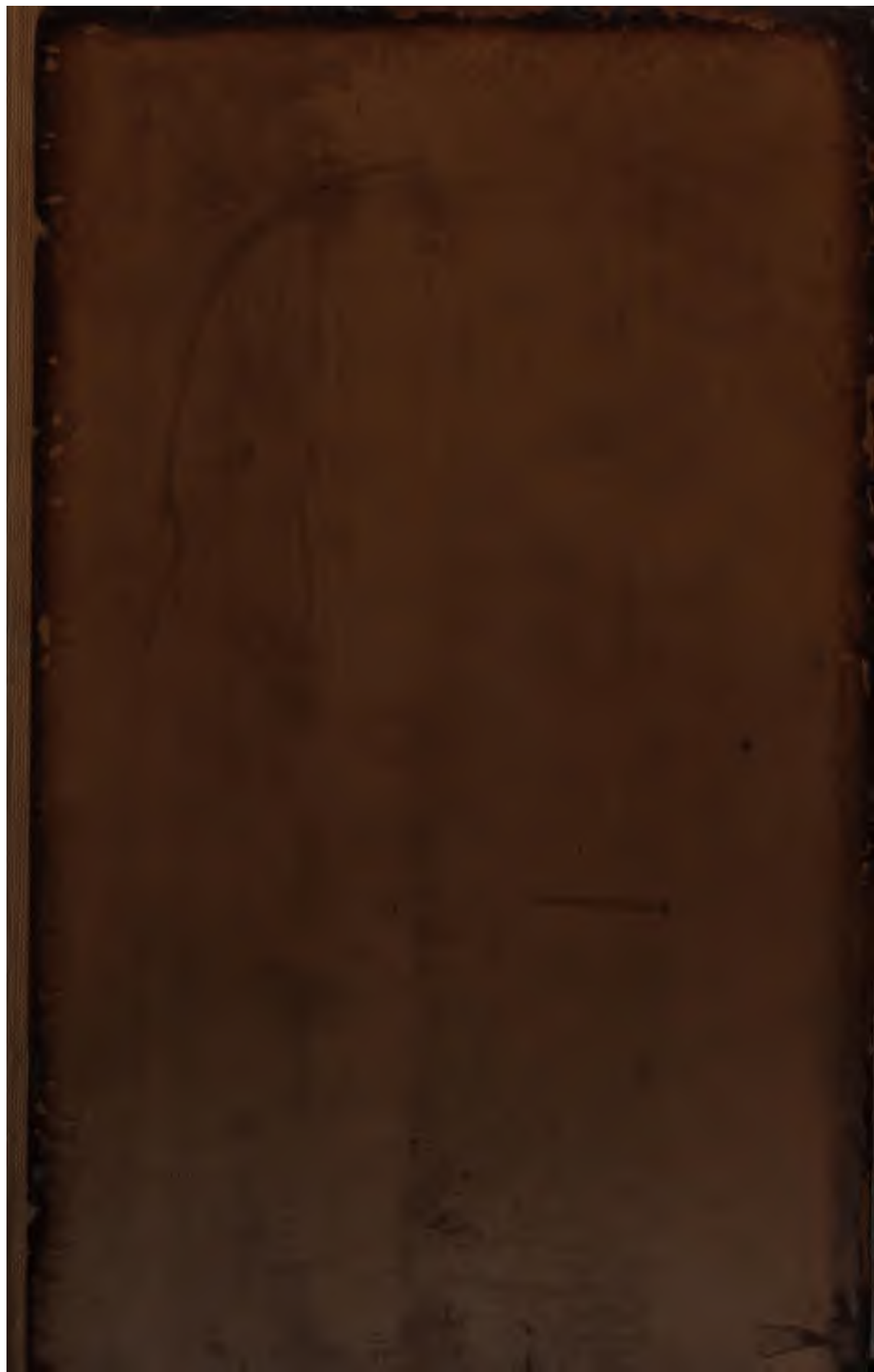
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REPORTS OF CASES

DECIDED IN

THE HOUSE OF LORDS,

UPON

APPEAL FROM SCOTLAND,

FROM 1753 TO 1813.

VOL. IV.

BY

THOMAS S. PATON,

ADVOCATE.

BEING THE CONTINUATION OF THE

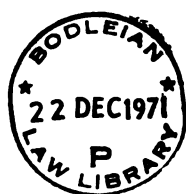
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LORD KENYON, from 1788 to 1802.

LORD ELLENBOROUGH, from 1802.

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HON. SPENCER PERCIVAL,	- - -	from 1802.

LORD PRESIDENT OF THE COURT OF SESSION.

RIGHT HON. SIR ILAY CAMPBELL, Bart.	- -	1789 to 1808.
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ROBERT BLAIR, Esq.	- - -	1789 to 1807.
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CASES

DECIDED IN

THE HOUSE OF LORDS,

UPON APPEAL FROM

THE COURTS OF SCOTLAND.

THE RIGHT HONOURABLE JOHN VISCOUNT } *Appellant;*
 ARBUTHNOTT, }
 JOHN GILLIES, Merchant in Brechin, *Respondent.*

House of Lords, 18th Dec. 1797.

LEASE, REDUCTION OF,—FACILITY, FRAUD AND LESION—PROROGATION OF, OR LEASE IN REVERSION.—Reduction was brought of five several leases granted to the respondent, a merchant in Brechin, on the ground of fraud, facility, and lesion :—Held, the circumstances proved in this case, not sufficient to set aside the leases, though granted while existing current leases had several years to run.

THIS was a reduction brought of five several leases granted by the appellant's father to the respondent, a merchant in Brechin, on the same grounds of reduction as those mentioned in a preceding appeal, ante p. 613, Vol. III.

The appellant's statement was, that the respondent had prevailed on his father, the late Viscount, when he was 88 years of age, labouring under dropsical disease, and addicted to habits which aggravated his infirmities, and while his mental faculties were impaired, to grant him no less than five different leases of five separate farms, some of which lay several miles discontinuous from others of them, and upwards of twenty miles distant from the respondent's ordinary residence. Of these five leases, four were obtained before the expiry of the current leases; and one of them,

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ARBUTHNOTT
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1797. the lease of Kinmonth, did not commence till a period of many years after its date, having been obtained in 1786, with an entry in 1801, after which it bore to be for a term of 57 years, so that, from its date to the expiry of the lease, there was a term of seventy-two years. The rent payable for the leases of these five farms amounted *in cumulo* to £364 sterling, while the real value of the farms amounted to £818 sterling per annum.

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ARBUTHNOTT
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GILLIES.

On the other hand, it was stated by the respondent, that when the late Viscount came to the succession of these estates, agriculture had made little or no progress. The rent of land was in consequence very low, and the husbandmen and tenants were as indigent as they were ignorant. In this situation of things, the late Lord Arbuthnott saw, that by introducing a more intelligent and a more substantial tenantry, he would considerably raise the rent and value of his estate. He accordingly used his utmost endeavours to procure such tenants; and, in order to encourage them to bestow their industry and lay out their money in improvements, he gave them leases of considerable endurance, which plan had been approved of and practised in other parts of the country.

It was also stated that the appellant's father intended, by these leases, and by an entail which he executed, to prevent his estate from being squandered away by his sons. And, with these views, the Viscount granted to the respondent improving leases of considerable endurance, that being necessary to any plan of improvement to be conducted *at the expense of the tenant*. In these circumstances, the five leases alluded to were granted, and at a time when the Viscount's mental and bodily faculties were unimpaired and in the fullest vigour.

The reasons of reduction were lesion, fraud, and circumvention, and an allegation that the Viscount was facile and incapable of managing his own affairs.

A condescendence of the facts by which the appellant meant to establish these grounds of reduction was ordered, but, when given in, was found to be irrelevant. A second condescendence was ordered, and shared the same fate. At last a proof was gone into, and reported to the Court.

It was proved that the Viscount was very careful of his money and penurious. That, in order to save money, he would live in his room in winter without a fire. That by this means—and by letting out his farms in the manner

described—he was enabled to transact and manage his whole estate without a factor, and to see it improve yearly in value at the *expense of his tenantry*: That so far from losing by this, he had acquired a great gain. When he came to the succession in 1757, the estate was incumbered with debt, so as not to yield him a reversion of more than £40 per annum. When he died in 1791, he left it yielding a free rental of £4000 per annum, having in the interval paid off £12,000 of debts incurred by his sons, and left £40,000 of ready money.

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It was also proved that his servants used familiarities with him,—often laughed at him during the latter years of his life. It was also proved, that while they often heard him complain of some of the tenants whom he named, having taken advantage of him in their leases, he never stated that the respondent had done so in his leases. It was also proved, by witnesses acquainted with the value of land, who knew the farms before they were taken, and at the time they were taken, that there was no lesion in the bargain; and that Lord Arbuthnott, so far from being a facile man, was a person of uncommon acuteness, and of the greatest attention to his affairs: That he had been bred to the law, and practised as a writer and notary, and afterwards had acted as factor to a preceding Viscount on the estate, to which he himself afterwards succeeded as collateral heir.

The Court pronounced this interlocutor: “Repel the Mar. 9, 1796.
 “reasons of reduction, assoilzie the defender, and decern:
 “Find the defender entitled to expenses, and appoint the
 “account thereof to be given into Court.”

On reclaiming petition, the questions discussed were, 1st, Whether the late Viscount, at the time of granting the leases, was *legally* facile? 2d, Whether, in granting these leases, he had suffered lesion, or had made unfavourable bargains for himself? 3d, Whether the respondent had used any fraud or imposition or undue influence, or other improper means of any kind, in order to procure the leases? And, 4th, Whether, upon the whole circumstances of the case, the appellant had made out *any legal ground* of reduction against all or any of the leases?

The Court, upon again advising the case, pronounced an interlocutor adhering; and ordered the account of expenses Mar. 8, 1797.
 to be given in.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel, it was

1797. Ordered and adjudged that the interlocutors be affirmed,
with £100 costs.
DOUGLAS
v.
MURRAY, &c. For Appellant, *Wm. Grant, John Dickson, Wm. Tait.*
For Respondent, *Sir J. Scott, Wm. Adam, John Clerk.*

WILLIAM DOUGLAS, Esq., *Appellant ;*
JOHN MURRAY, ROBERT HENDERSON, and
R. BELL, surviving Trustees of ROBERT } *Respondents.*
DALRYMPLE,

House of Lords, 29th Dec. 1797.

TRUST—FACTOR AND TRUSTEES—POWERS—ACQUIESCENCE FROM
LAPSE OF TIME—PENALTIES IN AN ADJUDICATION.—Circum-
stances in which a factor for trustees on a private trust, who was
also a trustee, was to be presumed as having acted with the con-
currence of the trustees in abating £499 of penalties, accumulated
in an adjudication in a debt due to the trust, and which he had
recovered and discharged ;—and action being raised against the
appellant, on whose estate the debt was constituted, to make good
this sum, twenty-five years thereafter, and after the factor had
been removed and had become insolvent, dismissed, reversing the
judgment of the Court of Session.

In the ranking and sale of the estate of Darnock, belong-
ing to the appellant's father, William Henderson became
the purchaser of the estate.

Robert Dalrymple, W.S., was a large creditor on the
estate ; and was ranked in the decree of sale for the con-
tents of his adjudications, amounting, including interest and
penalties, to the sum of £3965. 16s. 9½d.

Robert Dalrymple, before his death, executed a trust
disposition in favour of the respondents, John Murray,
Robert Henderson, and Alexander Orr, W.S. They ac-
cepted, and entered on the management of the trust ; and,
with the view of facilitating the recovery of the trust funds,
they granted a factory in favour of Mr. Orr, one of their
number, “ with power to him to uplift, ingather, call for,
“ pursue, discharge, and convey all debts and sums of
“ money, heritable or moveable, due and owing to the said
“ deceased Robert Dalrymple, by bonds, bills, decreets,
“ accounts, or any other manner of way, specially or gene-
“ rally assigned to us by the said settlement, with all annual
“ rents due thereon, and expenses incurred thereanent ; and
to apply his intromissions therewith under our directions,

“ or a quorum of us,” &c. “ Declaring that the said Alex- 1797.
 “ ander Orr shall not be liable for intromissions or negli-
 “ gence of any kind.”

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 v.
 MURRAY, &c.

The trust deed declared that “ the trustees, or such of them as shall accept of the said trust, and act in consequence thereof, shall not be liable for omissions, nor in solidum, one for another, but each shall be liable and accountable for his own actual intromissions only; nor shall they be liable for any factor or cashier to be appointed or employed by them, further than that he is habile and reputed sufficient and responsible for the time, being satisfied that my said trustees shall act therein as if they were acting for themselves.”

In virtue of this factory, Mr. Orr received payment of the debt due to the trust from the Darnock estate, which belonged then to the appellant's father, afterwards to William Alexander, whose interest was purchased by Sir William Pulteney at the judicial sale thereof, with a reversion over to the appellant, but the factor, instead of receiving the full sum due, as contained in the decree of sale and warrant obtained from the Court, £3965. 16s. 9½d., he granted a discharge for £3465. 17s. 1d., being £499. 18s. 8½d. less.

In these circumstances, the respondents, along with other parties interested, raised a summons of reduction of this discharge, calling the appellant and Sir William Pulteney,* and demanding payment of the sum of £499. 18s. 8½d., twenty-five years after the date thereof, and after the removal, the insolvency, and subsequent death of the factor, on the ground that, by his factory, he had no power to abate the sum for which he had obtained the warrant of the Court.

The action being thus brought against the appellant, in defence, he stated, that by the factory and commission, the full powers of the trustees were delegated upon the factor. That the trustees, by the trust deed, had full power “ to command, transact, and agree thereanent;” and although the factory does not in express terms contain these words, yet they must be implied, especially with reference to one who, while acting as factor, was also a trustee at sametime. That there was no step taken by Mr. Orr without the respondents' knowledge; they were aware that this sum of £499. 18s. 8d. consisted of penalties entirely—that such were

* Sir William gave in a minute, stating, that he had no objection to decree going out, under the proviso that he should be no further liable than to the extent of the balance of the price in his hands; and appeared no further in the action.

1797. rarely exacted, and when exacted, only to the effect of covering expenses.—That in point of fact a meeting of the trustees was called by Mr. Orr to have the abatement sanctioned by them, as was clearly proved by the following entry in Mr. Orr's book: "To incidents in tavern with Mr. Dalrymple, Mr. Murray, Mr. Hay, and Darnock's two agents, settling the debts due by Darnock, 15s. 6d.—27th "June 1771," which meeting took place after the decree and warrant was obtained. It was further stated that the majority of the other creditors had settled their claims by accepting the principal sums and interest, and neat expenses, and abating the penalties.

Feb. 6, 1793. The Lord Ordinary, of this date, pronounced this interlocutor. "In respect that Alexander Orr had no power to "compound or give down any of the debts, at least without "concurrence of a quorum of the trustees, and that it does "not appear that they concurred in or authorized his dis- "charging the debt in question for less than the sum for "which the warrant of the Court, upon the purchaser, had "been granted: therefore reduces the discharge, disposi- "tion and assignation granted by the said Alexander Orr to "William Alexander, the purchaser, in so far as regards "that part of the debt which was given down by the said "Alexander Orr; and finds the defender liable to the pur- "suers in payment of the said sum of £499. 18s. 8d." A representation being presented against this interlocutor, the Lord Ordinary reported the case to the whole Court, who, Nov. 29, 1793. of this date, reduced "the discharge, disposition and assignation granted by the said Alexander Orr to William "Alexander, the purchaser of the estate of Darnock, in as "far as regards that part of the debt which was given down "by the said Alexander Orr; find the said William Douglas "liable to the pursuers in payment of the sum so given "down, amounting to £499. 18s. 8d., with interest thereof "since the term of Whitsunday 1768." Other three inter-

Jan 25, 1796. locutors followed, of these dates, which simply followed out Jan. 28, 1797. the findings therein.

Feb. 18, 1797. Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The trust deed and settle- ment granted by Robert Dalrymple in favour of the re- spondents, his trustees, vested them with the full property of the estate, with "power to collect the debts due to him, "and to grant receipts and discharges or conveyances of "the same, and to compound, transact, and agree there-

"*anent*," and declared that they should not be liable for omissions, nor in solidum, nor for any factor or cashier to be employed by them, but each for his own actual intromissions, "being satisfied that my trustees will act herein as if they were acting for themselves." The faculty granted by the trustees to one of their own number empowered him to uplift, discharge, and convey all debts and sums of money, heritable and moveable, and declared that he should "not be liable for omissions or negligence of any kind, but only for his actual intromissions." It is proved that Mr. Orr did not grant the discharge sought to be reduced, without first consulting the trustees. He did not act on the bare authority of these powers, although ample and sufficient; the authority of the trustees was actually taken for the abatement of the penalties and accumulated interest in question; for after the decree and warrant of the Court was obtained, a meeting took place, as is proved by the entry in Mr. Orr's books charged for attending that meeting, for "settling the debts due by Darnock," and the names of two of the trustees are mentioned as present, along with Mr. Dalrymple's eldest son, as a beneficiary under the trust. The discharge, besides, was signed by Robert Bell, one of the respondents, as a trustee; so that the whole transaction was gone into with the full knowledge, concurrence, and consent of the trustees. Besides, the established practice in the law of Scotland has been, when a creditor, by adjudication upon bonds which bear a penalty in case of non-payment, comes to receive payment of his debt, out of the price of a bankrupt estate, the penalties and interest accumulated upon them, although they may be due by the strict rigour of law, yet are seldom demanded, and never paid, except in so far as covers costs. Mr. Orr was himself a creditor on the estate, and he acted in the same manner in discharging his own claim, and several other creditors acted in the same spirit. If therefore he, as a trustee, or as factor and trustee, had power to "*act herein as if they were acting for themselves*," why challenge the transaction, which has not exceeded these powers, and why challenge it when it is so manifest it had their own authority and consent? Besides, the great delay and lapse of time in bringing this challenge ought to be a complete bar to the action, as upon a presumed acquiescence from their taciturnity.

Pleaded for the Respondents.—Mr. Orr had no power to discharge or convey the adjudications on the estate of Darnock, without receiving payment of the sum contained

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 ———
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in the act and warrant of Court. To abate claims is an extraordinary power, which a mere factor cannot exercise without it be specially conferred. It was therefore illegal for him to grant a discharge and conveyance for a sum less by £500 than what was due of the debt. The trustees never gave him authority so to transact and discharge, and it was therefore also illegal for Mr. Alexander to accept of such discharge and conveyance, knowing as he must have done, that it flowed *a non habente potestatem*; and this objection strikes with equal force against the appellant, who now comes in his place. Even if the trustees had authorized this discharge, they would have been still liable, because the trust settlement gave them no such powers to part gratuitously with £500 of the trust funds in this manner. Nor is it of any consequence to show, that the sum abated was equal to the penalties on the debt; because the question always is, what was the amount of the debt in the decree and warrant? If penalties formed a part of that amount then they were as legally due, and exigible just as clearly as the principal sum and interest.

After hearing counsel,

LORD THURLOW said:—

“My Lords,

“ This is an appeal from the unanimous decree of a pretty full Court, to which therefore I lean with some degree of favour. But I have listened with eager anxiety to the able argument which has been held at the bar, to learn what possible ground could be suggested in support of the judgment. I can find no trace of it but in the short note of the opinion of the Lord Justice Clerk; he put it upon this, that he did not think that the trustees were consulted upon the transaction of the discharge granted by the factor. From this, I take the consolation to myself, that I understand the true point of this cause; namely, whether these trustees were consulted, and concurred, or not? The Lord Justice Clerk does not say whether he would have deemed any specific consent necessary; but seems to think that if the trustees were consulted, and concurred, the judgment of the Court ought to have been on the other side; and that, for want of such concurrence, the judgment was to be against the validity of the discharge.

“ I shall recapitulate the circumstances which appear necessary to be considered in this case. In 1759 adjudications were obtained of the estate of Darnock by several persons, and, among others, by one Robert Dalrymple, for the sum of £3965 and a fraction. This was composed of debts, to which Dalrymple appears to have been entitled in various ways. It is surmised for the appellant, that he bought up some of them while agent for Darnock, and that he ob-

tained eases from the creditors. I give my opinion freely upon this, that if he did not buy up these debts expressly with Darnock's consent, and for his use, Darnock would not be entitled to the benefit of the cases. But it is not proved that he did so. One Graham, a witness, says it is believed that Dalrymple got abatements, but for a witness to say so, is totally unavailing.

"Others of the debts in Dalrymple's person had been assigned to him by other creditors, that he might act as trustee for them. Your Lordships have heard it argued, that notwithstanding of such assignment, there still remained an independent interest in the creditor; but in my opinion it is not so, the creditor relies on the trustee, and it is impossible to impeach the acts of the latter, except collusion take place between him and the debtor.

"I consider all the debts to have been vested in Dalrymple, as well those belonging to himself, as those which he held in trust. He led the adjudication in his lifetime, and executed a disposition of his estate, real and personal, to trustees, to whom he gave authority to compound, transact, and agree, and do everything relative to the trust in the most ample form; and a perfect trust as to the whole, was reposed in them. They granted a subordinate commission to Orr, one of their number, to uplift, call for, discharge, and convey all debts real and personal. I agree, if this cause rested entirely on the acts of Orr, that he had no authority to compound, and by doing so would not have bound the trustees. The cause is therefore reduced to the single question, whether the trustees be bound or not, by the transactions which have taken place?

"I conceive, that the acquiescence on their part for such a length of time, must be held to carry not a prescription, but a presumption of reason that those persons, with all the opportunities of knowing the circumstances of the case, which, it is evident from this cause, they had, were satisfied with the acts of the factor. There would otherwise be no security whatever in the affairs of men. If no challenge were brought in a reasonable time, but if they forbore to stir in the matter, when it was brought before them again and again, it affords a demonstration that they saw some reason why they should not stir in it at all.

"A circumstance was stated of a meeting held in August 1771, previous to the discharge, at which these abatements were probably settled. It was ingeniously argued on the other hand, that no agreement could at that meeting have been made, nor any agreement whatever that would have been binding relative to this debt, without the concurrence of three trustees. I think, however, it is probable that the abatement of the penalties was under consideration at this meeting.

"I go entirely, in this cause, upon the abatement of the penalties, these are computed so exactly in the present case, that it is obvious the parties to the discharge must have made the abatement with

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reference to them. The Court of Session have adopted a principle, that when penalties are asked for in a court of distributive justice, they allow them no further than to cover expenses incurred. In this country, the moment that a penalty is mentioned, the court only go to the principal sum really due. The Court of Session have gone rather awkwardly to work on this subject, with regard to adjudications ; if they find any flaw in an adjudication, they do not extend it, to cut down *bona fide* creditors, but to cut down penalties, though they should be due upon the express words of a contract. I remember to have had a conversation on this point with the present President of the Court of Session, and I believe there is nothing the Court will not lay hold of, to reduce the process of adjudication *eo usque* as to penalties. This being familiar in the law of Scotland, it will not be denied me, that most frequently penalties are cut down by the Court of Session in adjudications.

“ I do not think that the enquiry suggested by Lord Eskgrove, as to what number of the creditors of Darnock accepted of abatements is material. The practice undoubtedly is, that penalties are cut down on slight grounds. And it is most probable that, at the meeting on the 17th August 1771, this was the subject of deliberation. I agree with Mr. Grant, that what appears does not amount to absolute proof of this, but it is a circumstance of strong presumption.

“ In 1771, after this meeting, the discharge was granted, and it is also, from the circumstances of the case, to be presumed that the trustees had knowledge of the terms of it. When I speak thus, I mean a presumption *donec in contrarium probabitur*, not a presumption *juris et de jure*. It certainly might be done away by a proof to the contrary.

“ Those who employ factors must be presumed to know what is done by those factors ; and, in this view, the trustees of Mr. Dalrymple must be held to be aware of what was done by Mr. Orr, except in the case of corruption on the part of the factor ; but, in the present case, I lay bribery entirely out of the question, as not charged in the cause. Orr having been held by the trustees to have done amiss, in paying a large sum of money to the son of Robert Dalrymple, was turned off from his office of factor. Young Dalrymple, the grandson of this Robert, then suggested one Innes to be factor in his room ; and of the acts of this second agent they must also be presumed to be cognisant.

“ The first act of Innes’ administration was to call for Mr. Orr’s accounts, which were accordingly rendered ; and, in one article of these, it was expressly mentioned, that in the adjudication upon the estate of Darnock, the penalties were given down and deducted, with the concurrence of the two Dalrymples. This fact was stated to the factor appointed to call Orr to account ; and is it possible to say that the trustees can be held to have been ignorant of this ? In

such a view of the case, no person can be in safety to deal with a factor.

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“ After this, Orr is sued in an action of count and reckoning, in which he is charged with various articles, but this was none of them. Are the trustees to be held so remote from their own business, that they did not know what was then passing? This action depended for several years; and Orr afterwards died insolvent.

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“ And further, an action was afterwards raised by the trustees against Darnock himself, in which not a word was said of the transaction in question. They would have it presumed that they remained ignorant of it till 1791, when they discovered it by means of another process. I wish this other process had been produced, for I think it is probable that it would also have been against this presumption of the trustees. They were not anxious, it is said, to inquire into the matter, till pinched by claims on the estate of Dalrymple. But will a court of justice allow that they were not cognisant of their own acts? Is it any reason to be urged on their behalf, that they paid no attention to the affairs entrusted to them? And, at the end of such a length of time, shall they be permitted to make use of this transaction? If twenty-five years will not conclude a matter of this nature, 2500 years would not do it.

“ I have said this much with regard to the debts which belonged to Dalrymple in his own right;—there were others contained in his adjudication, in which he was only interested as trustee. It was suggested, though but faintly, that Bell, Clarinda Douglas, Swan, and others, have to come in on grounds of their own, that *they* were truly the creditors, and that Dalrymple was only interested as assignee of their debts. What does this amount to, but that Dalrymple had the management of both? They petitioned the Court, saying, that they had a right as the *cestui que* trusters of Dalrymple. They only called Dalrymple's trustees as respondents, who resisted the demand. The Court afterwards admitted them, and allowed them to take their share of the £500 and interest, on the ground it then stood; and found the trustees liable in £54. 2s. of expenses. But this is not appealed from by them.

“ Upon the whole, according to my apprehension of this case, not half the circumstances were necessary to confirm the discharge; the mere acquiescence on the part of the trustees for the space of twenty-five years, would have been sufficient: but, with the circumstances as they stand, I am clear that the appellant is entitled to *absolvitor*. I am happy that my opinion is so far on the same ground with that of the Lord Justice Clerk, for whom I entertain much respect. His Lordship decided against the appellant, on the ground that he thought the trustees had not concurred: whereas I think they must be presumed to have concurred.”

It was therefore

1798. Ordered and adjudged that the interlocutors complained of be, and the same are hereby reversed ; and that the defenders be assoilzied ; and it is further ordered that the pursuers do pay to the defenders the expenses incurred by them in the Court below, according to the course of the Court.

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For Appellant, *Sir John Scott, Wm. Tait.*
For Respondents, *W. Grant, Geo. Ferguson.*

NOTE.—Unreported in Court of Session.

GEORGE ROSS, sometime merchant in Dumfries, now of Stafford,	} <i>Appellant ;</i>
MARGARET M'DOWALL, Sister-German and Executrix of the deceased WILLIAM M'DOWALL of Gatehill, Accountant in Dumfries, now Spouse of HUGH STEWART of Gatehill ; and the said HUGH STEWART for his interest ; and JOHN AIKEN, Writer in Dumfries, Husband of the deceased JEAN M'DOWALL, the other sister, and Executrix of the said WILLIAM M'DOWALL,	
	} <i>Respondents.</i>

House of Lords, 5th Jan. 1798.

BILL—LIABILITY FOR PAYMENT.—A bill was drawn by a party for the accommodation of the acceptor, and was indorsed by the drawer to another, and indorsed again to the bank, with whom the acceptor got it discounted, and received the money. It being dishonoured, a third party, with whom the acceptor had business dealings, and who then had funds of his in his hands, came forward and paid it for the acceptor. Circumstances in which it was held, that he had no recourse against the drawer on the bankruptcy of the acceptor, as the moment he paid the bill for the acceptor the bill was for ever extinguished.

At the distance of eighteen years, action was raised upon a bill, in the following circumstances :

Feb. 16, 1777. The bill was drawn by the appellant Ross for £170 upon and accepted by William Kirkpatrick, for the accommodation of the latter. The bill was indorsed by Ross specially to Thomas Stothart or order ; and again indorsed by Stothart and Ross to " Robert Riddock, Esq., agent of the Bank

"of Scotland at Dumfries," with whom Kirkpatrick obtained the bill discounted, and received the amount. 1798.

In evidence that the bill was discounted for the accommodation of Kirkpatrick, there was produced a memorandum ROSS
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M'DOWALL, & C. holograph of Robert Riddock on 26th February 1777, the date of the bill, of this tenor,—“Discounted with the bank, “William Kirkpatrick’s acceptance to indorsed “by Thomas Stothart.”

Of the same date, it was proved by the private ledger of Kirkpatrick, that he made this entry, “By my acceptance “to Thomas Stothart this day, at three months discount, “£170.”

In these circumstances, the bill not having been retired when it became due, was protested at Mr. Riddock’s instance against William Kirkpatrick the acceptor, for non-payment, and against Thomas Stothart, and the appellant George Ross, for recourse. The protest was recorded, and a horning raised thereon, and a charge given. The bill then lay in the bank’s hands until May 1779, when William M’Dowall, who was a private banker, and in that capacity was in the practice of receiving and paying away money for Kirkpatrick, came forward and paid the amount of the bill and costs to the bank, as the appellant stated, for behoof of Kirkpatrick alone.

On delivering over the protest and diligence to M’Dowall, there was written on the back of it, in M’Dowall’s own hand writing, “Paid the bank on Mr. Kirkpatrick’s account, by “William M’Dowall, bill due 29th May 1777, £170.” Then followed an enumeration of the items of expenses on the bill, which, together with the interest calculated thereon, made it amount to £187. 12s.”

Mr. Kirkpatrick became bankrupt in Sept. 1781; and this bill, along with two others, were ranked by M’Dowall on his estate, he making the usual oath that he was a lawful creditor to William Kirkpatrick in these bills, and that he held no other security for the same. He also raised action against Mr. Kirkpatrick alone for payment of this bill, and the bill besides had the names of Mr. Stothart and Mr. Ross, *as indorsers deleted*, but retaining the name of George Ross entire, as drawer of the bill.

The bank agent, Mr. Riddock, died in June 1777, leaving Mr. M’Dowall as guardian to his children; Mr. M’Dowall himself died in April 1788; and Mr. Stothart, who indorsed the bill, died in 1790, but no demand was ever made upon

1798. him for payment of the bill. Nor was there any claim made against the appellant, until the present action was raised by M'Dowall's executors.
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M'DOWALL, & C. The question therefore is, Whether Mr. M'Dowall paid the bill to the bank on behalf of Mr. Kirkpatrick, the acceptor, and whether the respondents are entitled to insist against the appellant for payment?
- Dec. 19, 1795. The Lord Ordinary (Stonefield) found, "In respect it appears that the bill charged on was retired by Mr. M'Dowall for behoof of the acceptor, suspends the letters simpliciter, and decerns, superseding extract till the third sederunt day in January next."
- Feb. 1 & 2,
1797. But, on reclaiming petition to the Court, the Lords pronounced this interlocutor: "Alter the interlocutor reclaimed against, find the letters orderly proceeded, and decern: "Find the respondent liable in expenses." And, on further
- Feb. 21, — petition, the Court adhered to their own interlocutor.
- Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—From the nature of the obligation which lies upon the drawer of a bill, he is liable only in payment in the event of the acceptor having failed to retire the same, and of course, if the bill is taken up, either by the acceptor himself, or any person acting on his behalf, the obligation of the drawer is for ever extinguished, and there is no longer any ground for maintaining an action of recourse against him. That this is the precise state of the fact in the present instance, is proved by every sort of evidence which the nature of the case required, or could possibly admit of. The entry in the account current, between M'Dowall and Kirkpatrick, of date 20th May 1779, which specifies to a fraction the precise sum paid for the bill. The marking in the handwriting of Mr. M'Dowall on the back of the registered protest to the same effect—his entering a claim three years thereafter in the ranking of Kirkpatrick's estate, his own directions to his agent in Edinburgh, by letter of 7th October 1782, instructing him to make that claim in *name* of himself, his instituting an action against Mr. Kirkpatrick for this very bill, his affidavit in the ranking, his settlement of accounts with Riddock's executors without including this bill, and the deletion of both Mr. Stothart's name and the appellant's from the bill, all demonstrate the fact that he retired the bill, not on be-

half of Mr. Riddock, or Mr. Stothart, or the appellant, but for Mr. Kirkpatrick alone, as the acceptor of the bill.

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Pleaded for the Respondents.—In virtue of the appellant having drawn and indorsed the bill in question, and of the Bank of Scotland, as holders thereof, having duly intimated the dishonour to the appellant, and drawer, and indorser, it is indisputable that the bank was entitled to demand payment from the appellant as well as from the acceptor ; and if so, M'Dowall, who paid the sum therein contained to the bank out of his own funds, had right, in virtue of the assignation which he obtained from the bank, to have maintained the same claim against the drawer and indorsers, as well as the acceptor of this bill, which the bank might have done before granting the assignation. And even though the bill had been discounted at the bank for the sole accommodation of Kirkpatrick, the acceptor, that would not have afforded a plea to the drawer or indorsers against the claim of the bank for payment against them, as by putting their names upon it they became security for the contents. If, therefore, the bank had good title to recover from the appellant, so must the respondent, to whose brother that title and claim were assigned. And the evidence alluded to does not in the least degree deprive M'Dowall of his legal rights on the bill, or show clearly that he paid the bill for Kirkpatrick's behoof alone, and not on their account, or that he paid without a special regard to his rights against every party liable therein.

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After hearing counsel,

The LORD CHANCELLOR, (LOUGHBOROUGH) said :—

“ My LORDS,

“ This is a case of an appeal from two interlocutors of the Court of Session, which are stated to have been pronounced unanimously ; though, as these interlocutors were an alteration of one pronounced by the Lord Ordinary, it is difficult to conceive that they could be unanimous. No memorandums of the opinions of the judges are given to us ; and, on a point of law which is the same in both countries, I must regret if the judgment in the present case were unanimous. The opinion which I have to submit is so plain, that I conceive the Court has been misled by attending to the arguments in another cause, which has nothing to do with that between the present parties.

“ The facts in the present case are these : In 1777, a bill was drawn by the appellant, and accepted by one Kirkpatrick, and discounted with Riddock, agent for the Bank of Scotland at Dumfries ; and it

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then bore the indorsement of the appellant as drawer, and of one Stothart as indorser, below whose name the appellant again indorsed the bill. Stothart was merely as a security to the bank; and *prima facie* from the circumstance and mode of discounting the bill, it is to be presumed that it was for the benefit of Kirkpatrick, and that the name of Ross was only added for his credit with Stothart. In the private memorandum of Kirkpatrick this is confirmed.

“When the bill fell due, it was not paid; and Riddock protested it against the acceptor Kirkpatrick, and against the appellant and Stothart the indorsers. Upon this protest a horning was raised at the suit of the bank; at this time Stothart's indorsement continued upon the bill.

“The matter lay over till the 20th of May 1779, when M'Dowall, the brother of the respondent, pays the bill to the bank on account of Kirkpatrick. In 1782, M'Dowall took an assignment of the bill; and afterwards, on the bankruptcy of Kirkpatrick, who was then indebted to him, he claimed a balance out of the estate of Kirkpatrick, of which this bill was stated to be a part. At the time of the payment of the bill by M'Dowall, it appears that he had in his hands £1500 or £1600 belonging to Kirkpatrick, and, subsequent to that, larger sums came into his hands; but, by dealings between the parties, the balance came to be in favour of M'Dowall. He keeps his accounts regularly all this while; the name of Stothart, as indorser, was struck off the bill, and no demand during his life was made against the appellant Ross.

“After M'Dowall's death, disputes arose between his representatives and the family of Riddock. Riddock was affected indirectly in this bill, being guarantee to the bank for all bills discounted by him. But in the case of this bill there existed no reason for anxiety on the part of Riddock's family, for Stothart, who was bound to them, was perfectly sufficient and solvent. In the arrangement of Riddock's affairs, when his son came of age, an action was brought against the respondents for their late brother's intromissions; and a counter action by the respondents, in which they made several claims against the estate of Riddock, among others, an account of the bill in question, the payment of which the respondents endeavoured to connect with their late brother's administration of Riddock's affairs. But with these matters the appellant Ross had nothing at all to do.

“After a lapse of eighteen years, however, an action was brought against the appellant, the drawer of the bill. But it appears that Kirkpatrick the acceptor's own money, had already paid it, from the account stated by M'Dowall, and his affidavit in the bankruptcy of Kirkpatrick. And the moment that the acceptor paid the bill it was gone; it was paid as it ought to be paid, and so was for ever extinguished. I lay no blame upon M'Dowall in this business; he has been dead several years. He settled accounts with the accep-

tor, putting this bill to his debit, and for the balance of the account due to him he enters into the ranking. 1798.

“ Under these circumstances, I am sorry to find this case come before you. And I must therefore move that the interlocutors complained of be reversed, and the interlocutor of the Lord Ordinary be affirmed, that the appellant be assoilzied, and that the respondents do pay to the appellant his costs in the Court below, according to the course of the Court.”

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SCOTT.

It was accordingly

Ordered and adjudged, that the interlocutors of the Lords of Session, of the 1st and 21st February 1797, be reversed. And it is further ordered, that the defender (appellant) be assoilzied; and that the pursuers (respondents) do pay to the defender (appellant) the expenses incurred by him in the Court below, according to the course of the Court.

For Appellant, *W. Grant, W. Adam, Thos. W. Baird.*
For Respondents, *Sir John Scott, Chas. Hay, Wm. Tait.*

(M. 7625.)

WILLIAM SMITH, WILLIAM DRYSDALE of the
Turf Coffee-House, WILLIAM DUMBRECK
of the Hotel, JAMES ROBERTSON of the
Black Bull, JOHN HAY, and JOHN MAC-
KAY, and Others, Chaise Hirers or Post-
masters in Edinburgh, } *Appellants;*

WILLIAM SCOTT, Procurator-Fiscal of the
County of Edinburgh, } *Respondent.*

House of Lords, 8th Jan. 1798.

POSTMASTERS—ILLEGAL COMBINATION TO RAISE RATES OF POSTING
—JURISDICTION OF THE JUSTICES.—Circumstances in which it was held that an agreement among the posting masters in Edinburgh, to raise the rates of posting, was an illegal combination, and that the justices had jurisdiction to decide in such a case. An appeal being taken to the House of Lords, the Lord Chancellor, in affirming the judgment, intimated that such a combination was illegal; but that the justices had no powers to fix the rate of posting. And that, neither for the disposal of these points, nor the other questions appealed against, had the appeal been brought in a regular manner; it being brought prematurely, and before the whole question was exhausted in the Court below.

1798. The appellants finding themselves losers by carrying on the business of chaise hirers or postmasters at the rate of 9d. per mile for posting, were under the necessity of giving notice to the public that after a certain date "they would be under the necessity of charging for every pair of horses travelling post 1s. per mile, exclusive of duty."

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The advertisement was signed, at the desire of the appellants, by Mr. Smith, as having the most extensive business in that line of any person in the city of Edinburgh. And, in order to satisfy the public that they had raised the fares, merely from necessity, they also published an account of the loss sustained by them from posting for sometime past, owing to the rise of every article in the posting line for years back.

But the respondent, conceiving that all these proceedings were illegal, presented a complaint to the justices of the peace of the county against the appellants, in which he accused them of an illegal and improper combination to raise the fare of posting, and insisting that it was altogether unwarrantable in them to take such a step without the permission of the justices of the peace, as authorized to regulate their fares. He also concluded that they should not only be fined for this *illegal combination*, but also that they should be prohibited, under heavy penalties, from raising their fares, in all time coming, except under the authority of the justices of the peace.

In answer to this complaint, the appellants contended that the justices of the peace had no legal authority to regulate the affairs of posting.

The justices repelled the objection stated to their jurisdiction; and found "the complaint competent; and find it proven by the admission of the defenders that the combination complained of, and the increasing of the fares for posting by their own authority, and publishing the same in the Edinburgh newspapers, was illegal and unwarrantable, and in contempt of the authority of this court; therefore prohibit and discharge the said defenders, and all others concerned within this county, from exacting higher rate of fares than those which were in use to be exacted previous to the attempt made by them in spring 1793, until otherwise ordered by the justices, under penalty of 20s. for each transgression," &c.

Nov. 26, 1795. On further hearing, before a committee of the justices they adhered.

Interlocutor
of the Justices
Oct. 28, 1795.

A bill of advocacy being brought before the Court of Session, the Lord Ordinary (Swinton) appointed the case to be argued in memorials, with the view of reporting the case to the Court, which was done accordingly.

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SMITH, &c.

n.

SCOTT.

The respondent, in his memorial, maintained, 1st. That it was illegal in the appellants to enter into a combination to raise their fares. 2d. That the justices of the peace had jurisdiction, by which they were entitled to entertain the question, and to decide whether the appellants had or had not reason to increase their fares. 3d. That the justices had done right in prohibiting any increase of fares in the present instance.

The first of these grounds resolved into the second, which was the only point determined by the Court of Session, the respondent maintaining, 1. That it was a matter of police to prevent the extortion of postmasters and innkeepers; and that this salutary power of restraint for the public good must be lodged somewhere. 2. That this power could be lodged nowhere so properly as in the justices of the peace; and that they have been in the constant and immemorial practice of exercising it. 3. That though there is no statute expressly vesting the justices of the peace with such power, yet there are many acts of Parliament by which they are empowered to regulate matters for the accommodation of travellers, as well as to fix the wages and prices to be charged by workmen, and, by parity of reason, they had power to regulate the matter of posting, and to fix the rates of fare to be charged.

The Lord Ordinary, after consulting with the Lords, re-Jan. 15, 1796. fused "the bill as to the competency of the justices of the peace, but removes the prohibition in so far as to allow the complainers one shilling and two pence per mile, duty included, and passes the bill, to the effect of trying the question as to the amount of the fares for posting."

On a reclaiming petition from the appellants, praying "so far to alter the former interlocutor as to remit to the Lord Ordinary to remit to the justices with instructions to dismiss the complaint as incompetent; or at least to remit to the Lord Ordinary to pass the bill *in toto*." But the Court adhered to the interlocutor reclaimed against. July 5, 1796.

As to the rate of posting, the Lord Ordinary allowed to both parties a proof. And this order was renewed of this Feb. 23, — date. It was allowed to expire, and again renewed of this Dec. 23, — date. Mar. 6, 1797.

1798. The whole question was then brought by appeal to the House of Lords.

SMITH, &c. After hearing counsel,

v.

SCOTT. "The LORD CHANCELLOR LOUGHBOROUGH said,

"My Lords,

"This is a case brought before your Lordships, which stands here under peculiar and whimsical circumstances. The appellants consist of six persons specified, *and others*, and the gravamen they complain of, is more against certain reasons given by the Judges of the Court of Session for their determination of the present question, than any thing distinctly contained in the judgment itself.

"In 1795, a combination was entered into by the appellants, to fix a certain price or rate for posting; and, for that purpose, they published an advertisement in the Edinburgh Newspapers, that they were to charge one shilling per mile for a pair of horses, exclusive of duty. By this, your Lordships know, they were imposing a law to demand from the public, a certain and fixed rate for posting, which was illegal and unwarrantable. By this combination, they were subjected to the jurisdiction of the justices, as is not controverted. The case is very different, whether an individual might or might not ask what rate for posting he thought fit; but he must not make a party business of it.

"Upon this, a suit was instituted by the procurator fiscal of the county against the appellants, by petition and complaint, to the justices of the peace. In this country, the proceeding would have been by presentment to the grand jury, and indictment, which would no doubt have been found against the parties in the combination, who would have been punished. If they had given redress for their proceedings, the punishment would have been *pro forma* only.

"The justices in Scotland were met with an objection to their jurisdiction, and, after consideration, they repelled the "objection to "the jurisdiction *in this case*, and found the complaint competent, "and proved by the admission of the defenders." The strict legal consequence of this would have been, to have proceeded to punishment against them by fines, measured by the abilities of the persons implicated.

"Another idea, however, struck the justices. In 1761 certain regulations had been fixed by the justices of the county of Edinburgh with regard to posting, which had obtained and prevailed for some time. Murmurs afterwards arose, and similar regulations were adopted in 1793. Both these regulations were made in cases of combination; though I am far from saying, that some of the justices did not think that these were made *pleno jure*, and in virtue of competent jurisdiction in the justices to regulate such matters. At the head of them appear some of the judges of the Court of Session. In the present case, it has entered into the discussion, if such a power

exist or not; and some of the judges gave their opinions in favour of it. But I have no difficulty in saying, that no such power exists in the justices to fix the rates of posting. The origin of all their powers is in statute; and I adopt the opinion of the Lord President, that these powers are to be strictly confined, and not extended from one case to another by analogy.

“ I will go a little farther in this matter, and say, that even if the justices had such a power, I have great doubts if it would be proper to use it. In cases of monopoly, such as hackney coaches, which are confined to a given number of persons, it may be proper to fix rates for fares: and it is obvious that the public is well served by this monopoly. But though it may be proper to fix the rates in a case of monopoly, it is very different in a case of general concern like posting.

“ Experience shows that in this country, you have been well served on account of the failure of a measure which was attempted, of putting the *posts* into a mode of regulation similar to that on the continent. For this purpose, a bill was brought into Parliament, but the measure was opposed, and was not carried into effect.

“ In the present case, the justices have only found, that as the parties were liable to punishment on account of the combination, they should continue to work at the old rates, with an invitation to them to apply to the justices to settle the rates proper to be taken in future. Nor was this an improper mode of proceeding:—if a combination of journeymen tailors, or others, takes place in this country, nothing is so common as to suspend the punishment awarded, if they will return to their former rates. In that view it was that the appellants ought to have considered the determination of the justices. But they applied to the Court of Session against the decision of the justices; and the Court found that the complaint was competent in this case, where there had been an illegal combination. If it were possible to reverse the interlocutors upon this ground, it would set up the doctrine, that such a combination was neither illegal nor unwarrantable.

“ With regard to the rest of this judgment, by which the Court removed the prohibition, in so far as to allow the appellants to charge fourteen pence per mile, and passed the bill to the effect of trying the question as to the amount of the fares for posting, the appellants took no further steps before the Court. They then appeal to your Lordships from the judgment of the justices, and interlocutors of the Court of Session; but as criminals they ought not to have done so; as individuals, if they had waited till the Court had settled a rate of posting, they might have had a right to complain. But as to any danger in the interlocutors to the rights of that branch of trade, I must suppose the case of an individual asking such a rate as was here done by the appellants in a combination. If his doing so had not the effect to raise him up a rival, and if the justices imposed a pen-

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SMITH, &c.

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1798. alty on his doing so, he might refuse to acknowledge their powers, and the question would then be tried on the only case where it could occur. But here the parties have run up to your Lordships, to
 M'LEANS v. THORLEY, &c. crave, that you would say what the House of Lords should determine on some future occasion, if the case were brought before them.

"I submit, as my opinion, that this combination ought to be reprobated, and that the justices have not punished the parties by fine, as they ought to have done. Indeed, if I am not misinformed, the appellants have reaped advantage from their proceedings. The Court of Session said to them, take 1s. 2d. per mile for your post chaises, on account of the high price of hay, oats, and other matters used in your business, as an interim regulation. But, happily for the country, the price of these articles was soon lowered, and they still continued to charge the price of 1s. 2d. per mile. By these means, posting was dearer in this county than in any other county in Scotland.

"Upon the whole, it appears to me that the present appeal has been prematurely brought, and that your Lordships have no opportunity of trying the matter which the appellants complain of. It is an appeal rather from certain subjects of talk and discourse in the Court of Session, than from a judgment of that Court."

After this the EARL OF KINNOULL made a speech, which could not be distinctly heard, but entered into a defence of what had been done by the justices in the county of Perth on a similar occasion.

Whereupon it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed.

For Appellants, *W. Grant, W. Adam, Henry Erskine, David Cathcart.*

For Respondent, *Sir J. Scott, J. Anstruther, Chas. Hope, Wm. Dundas.*

JOHN & JAMES M'LEAN, Merchants, Leith,	<i>Appellants ;</i>
MESSRS. ROBERT THORLEY, BOLTON, and	} <i>Respondents.</i>
Company, Merchants in Narva, Russia ;	
and THOMAS CRANSTOUN, Writer to the	
Signet, their Attorney, - -	

House of Lords, 26th Feb. 1798.

CONTRACT OF SALE—PAYMENT OF PRICE—EXCHANGE.—Timber having been sold, but, in consequence of the insolvency of the

buyers, they wrote to the sellers to sell it as on their account ;—
 Held, that in this sale, the price received for it, and the price agreed
 to be paid by the original buyers, was to be taken into account
 along with the difference of exchange or value of money as be-
 tween St. Petersburg and London, when the timber was offer-
 ed back, and when it was first sold,—the account being stated in
 Russian money.

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THORLEY, &c.

This was an action arising out of the sale of timber bought
 by the appellants from the respondents, merchants in
 Russia. The appellants had engaged to send shipping to
 Narva to take away the timber which the respondents had
 ready for loading ; but owing to the difficulty of procuring
 shipping in the year 1793, during the war then existing, the
 appellants could not get shipping, and in the following year
 their affairs having become involved, they were obliged to
 give up their contract, and ordered the respondents “ to dis-
 pose of the wood, and as prices, I understand, are settled
 for the ensuing season at the same rate I was to pay, I
 flatter myself you will be able to get quit of it with no
 loss.”

The respondents did not sell the wood, but retained it
 themselves at a valuation.

In the contract the appellants had bound themselves to
 pay the price of the timber by draughts on Amsterdam.

In these circumstances, the questions which arose were,
 1st. At what prices were the respondents to retain the tim-
 ber? Whether at the current prices as at 3d June 1794, for
 the timber called Dutch timber, according to the current
 prices in the *Dutch market*; or whether at the *current*
prices for Dutch timber in the *English market*. The cur-
 rent prices for Dutch timber in the English market being
 much higher than in the Dutch market; and the appellant
 contended that he was entitled to have the wood valued ac-
 cording to the current prices of Dutch timber of equal value
 in the English market, although it was proved that the
 Dutch timber was sent from Narva to Holland, and sold at
 a rate of one doyt, or one-eighth of a stiver per foot less
 than the respondents had allowed Messrs. M'Lean; and,
 consequently, as they maintained, had sustained a loss
 thereby. 2d. Whether the appellants were liable for the
 difference of exchange between Petersburg and Amster-
 dam as at these dates, namely, 31st July 1793, when the re-
 spondents ought to have been paid for the timber, and the

1798. 3d of June 1794, when the contract was given up. It being contended that the exchange between these two places on the first of these two dates was $24\frac{1}{2}$ stivers per rouble; whereas at the 3d of June 1794 it had risen to 29 stivers per rouble, so that the same number of guilders paid in Narva on 31st July 1793 would have purchased a greater number of roubles than on 3d June 1794; and consequently that the respondents were entitled to have this difference made good to them.

Feb. 17 & 18, 1796. The Court, of this date, sustained the allowance made by the respondents for the price of the timber taken back by them, with interest from a certain date. And with respect to the article of exchange, "find, that in settling accounts between the parties, effect must be given to the variations of exchange on the 3d day of June 1794, when the timber was taken back, from what it was on 31st July 1793, and remit to Charles Selkrig, accountant, to make up and report to the Court a state of accounts betwixt the parties."

In obedience to this interlocutor, Mr. Selkrig gave in his report, stating the account in four different views. In the first and second views, he stated the account in Dutch money; and in the third and fourth views, he stated it in Russian money, and calculating exchange as between St. Petersburg and London in his fourth view.

Mar. 11, 1796. On representation, the Court adhered; and, of this date, upon the objections to the accountant's report, they ordered
 May 21, — a condescendence of the facts the appellants undertook to
 June 14, — prove. A condescendence having been given in, and a proof allowed, by examination of certain merchants in London, engaged in the trade, as to the custom of merchants, the
 Nov. 29, — Court pronounced this interlocutor: "Find that the fourth view contained in Mr. Selkrig's report, must be the rule in settling betwixt the parties; and therefore decern accordingly; and, with regard to expenses claimed by the respondents, supersede consideration thereof until
 " day of next."

Jan. 25, 1797. On reclaiming petition the Court adhered, and found the
 Jan. 28, — appellants liable in expenses. Another petition was refused.
 Feb. 21, — ed. A bill of suspension was also refused.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1. That the respondents made their valuation of the timber without consulting the appellants, and even concealed what they had done for a

considerable time. Until they gave in their condescendence in this suit in January 1795, admitting that they had taken the timber to themselves at a valuation put upon it by themselves, the appellants imagined it had been sold. The respondents had authority only to sell the timber, and if they had sold it *bona fide* for the least price they could get, the appellants could not have complained. But the respondents had no authority to take the timber to themselves, especially at an undervalue; and as the appellants never approved of that transaction, they cannot be bound by it. The respondents are entitled to the fair and adequate prices, such as wood of the same quality was selling for at the time; and as it has been shown that wood of the same quality was selling during the season 1794 at 30 and 35 per cent. higher than the respondents allowed, they are entitled to that value. 2. As to the difference of exchange. The appellants' obligation was to pay a certain sum in guilders, by drafts on Amsterdam, or otherwise to pay the debt in pounds sterling, agreeably to the course of exchange between *London* and *Amsterdam*. They never came under an obligation to pay the respondents in Russian roubles or money. On all former dealings, the appellants paid, and the respondents were content to receive, payment in Dutch money; and whenever the payments were made in English money, the sums due were calculated by turning the Dutch money into pounds sterling, at the then existing rate of exchange between *London* and *Amsterdam*.

Pleaded for the Respondents.—1. The appellants in their foresaid dealings with the respondents, were bound by the general custom and usage of merchants, in the same trade, which the proof clearly establishes to be as found by the interlocutor. 2. Every loss sustained by the respondents, arising from the appellants' failure to perform their contract, ought to be borne by them, whether arising from the difference in exchange or otherwise; and on these grounds the appeal ought to be dismissed.

After hearing counsel, it was
Ordered and adjudged that the interlocutors be affirmed,
with £200 costs.

For the Appellants, *Sir J. Scott, W. Adam.*

For the Respondents, *J. Mansfield, J. L. Hubbersly.*

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<p><u>GILCHRIST</u> v. MACADAM, &c.</p>	<p>Mrs. ANN GILCHRIST, - - -</p>	<p><i>Appellant ;</i></p>
	<p>JOHN LOUDON MACADAM, & Another, Trustees of the deceased Honourable ADMIRAL KEITH STEWART, and ROBERT WATSON, Writer in Edinburgh, Common Agent in the process of Ranking and Sale of the estates of the EARL OF DUNDONALD,</p>	<p>} <i>Respondents.</i></p>

House of Lords, 5th March 1798.

This was an appeal brought by a postponed creditor on the ranking and sale of the estate of the Earl of Dundonald, complaining of the interlocutors of the Lords of Session in fixing the value at which the estates were to be set up and exposed to public sale, precisely on the same grounds as in the appeal brought by the Earl of Dundonald himself. Vide ante, p. 528, Vol. III.

Three other appeals were brought by other creditors in similar circumstances.*

Whereupon the respondents presented a petition to the House of Lords, praying that the order on the appeal of Ann Gilchrist might be dismissed. Upon which

“ The LORD CHANCELLOR said :—

“ That this was the fifth appeal which had come before the House, on the subject of the sale of certain estates belonging to the Earl of Dundonald. The House had affirmed the interlocutors in the first of these, with £50 costs, and had ordered the sale to proceed ; but, to defeat the judgment in that appeal, the four others have made their appearance, for the sole purpose of delay ; a proceeding highly improper, and which called for the interference of the House, to prevent similar practices in future.

“ From the respectability of the names of the counsel who signed Mrs. Gilchrist’s petition, I forbear to say much on the subject of the present appeal. I imagine they were some how or other employed by the appellant in the Court below. But, if appeals of such a nature were repeated, (and he hoped that this would be conveyed to the counsel who signed the appeal), that the House would proceed against the counsel whose names appear at appeals, in the same manner as the courts of this country do against counsel and others who sign or give countenance to frivolous and vexatious suits and actions.”

The appeal was dismissed accordingly.

* The Compiler has not been able to find the appeal papers in these cases, in any collection he has examined.

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ROBERT BEATSON, Esq., of Kilry, . . . *Appellant* ;
 MR. WM. JAMESON, *Respondent*.

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House of Lords, 5th March 1798.

EXPENSES OF PROCESS—AGENT AND CLIENT—APPEAL—COMPETENCY.

—A summons having been raised before the Court of Session against several debtors ; and *inter alia* against the appellant for £3. 5s. 10½d., for the price of bricks, he called on the pursuer at his place, and paid the amount, offering at the same time to settle the expenses. Mr. Jameson not being at home, and his clerk not knowing any thing about the expenses, he declined receiving them. Thereafter, Mr. Jameson's son, who was the writer that brought the action, took decree in absence, and sent the appellant a note of the expenses, amount £3. 11s. 3d., and raised horning, and charged thereon. In a suspension, the appellant was held liable for the amount, with the whole costs of suit, amounting to £35. In an appeal to the House of Lords, these interlocutors were reversed. There being here no contrivance on the part of the appellant to settle with the client, without the knowledge of the agent, he having tendered the expenses at the time he got a discharge for the account, and therefore was only liable for the amount of expense *then due*. Objection was stated to the competency of the appeal, as merely for expenses, but objection not regarded.

The appellant having occasion for some bricks of a particular kind, to be employed on his estate of Kilry, Fifeshire, ordered some bricks from a brickfield, near Leith, belonging to the respondent, a mason.

The bricks were sent accordingly, but as they happened not to be of the kind to suit the appellant's purpose, and as his near neighbour, Mr. Ferguson of Raith, was in want of some bricks at the time, for the use of his garden, they were, by the appellant's order, delivered to Mr. Nicol, principal gardener to Mr. Ferguson. In these circumstances, the appellant stated, that it being a matter of perfect indifference to him whether he should pay the respondent the trifling sum of money to which the price of the bricks amounted, (£3. 5s. 10½d.) and receive it again from Mr. Nicol, or that Mr. Nicol should pay it directly to the respondent ; so he naturally conceived it to be a matter of equal indifference to the respondent whether he should receive it of the appellant, by whom the bricks had been ordered, or of the person to whom the bricks were delivered.

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At the distance of two years, the appellant stated that nothing more occurred about the bricks, until one morning early, before he was out of bed, the respondent sent his servant for payment of the account. The appellant being then in bed, and apprehending that it would not be any inconvenience for the servant to call at Raith, which he passed in going back to Kirkaldy, desired his own servant to tell the man to go to Mr. Nicol, Mr. Ferguson's gardener, and he would pay him the money.

In a few days thereafter, he received a letter from a lawyer, making a demand for payment of this account. In answer, the appellant referred him to Mr. Nicol for payment, and application being accordingly made, Mr. Nicol's answer was, that he would speak to the factor, and send the money as soon as he received it.

Nothing further occurred until January 1794, when a summons before the Court of Session, against four other debtors, with his name included, was served on the appellant, no intimation having in the interval been made to him that Mr. Nicol had failed to pay the account for the bricks, or that Mr. Anderson had failed to see the factor about it. In these circumstances, the appellant wrote the respondent's country agent, (Mr. Anderson), stating, that had he known Mr. Nicol had not paid for the bricks, he would have settled long ago, and consequently that he was "not liable for any expenses incurred," and expressing his readiness "to pay for all bricks when demanded."

Jan. 31, 1794.

On the 26th January the appellant went to Edinburgh, and called on old Mr. Jameson to pay the account, but finding him from home, he paid the amount of the account, getting a receipt therefor from Mr. Guthrie, his clerk. At same time he offered payment of the expenses, which Mr. Guthrie declined to take. In the meantime, however, a demand was, about fourteen months thereafter, made by the respondent's son, Mr. Jameson, a writer in Edinburgh, for the expenses, amounting to £3. 11s. 3½d. This Mr. Jameson, the appellant alleged, was the real respondent in this case, and though he well knew the debt was paid, and an offer made at same time of the expense then due, yet he chose, unknown to the appellant, to proceed with the action, and took decree thereon, upon which horning was raised, and a charge given. The appellant, in these circumstances, brought a suspension of the charge.

June 2, 1795. In this suspension decree in absence was pronounced

against the appellant. And, on representation, the Lord Ordinary adhered. On another representation, the Lord Ordinary pronounced this interlocutor: "In respect there appears to be sufficient evidence in this case, arising from the admission of parties, and letters and correspondence in process, refuses the desire of the representation, and adheres to the interlocutor complained of."

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July 3, 1795.

Dec. 11, —

On reclaiming petition for the appellant to the whole Lords, the Court adhered. On further reclaiming petition, the Court adhered. And the account of expenses being given in, the Court decerned therefor against the appellant, amounting to £35. 4s. 7d.

June 3, —

The appellant presented a bill of suspension against the judgment of 10th March 1797, which was refused by the Lord Ordinary.

July 13, —

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. That the respondent was bound, in the particular circumstances, to give the appellant notice before he commenced his action; and not having done so, he is not entitled to charge him with the expenses incurred by it. 2. That if this were not so, yet after the original debt was satisfied, and the expenses tendered and abandoned, and the cause of action at an end, he was bound to give notice before he proceeded further; and not having done so, he is not entitled to charge the appellant with the expenses of such proceedings. 3d. That of several averments, material to the points in issue between the parties, a proof was neither required of the respondent, nor allowed to the appellant.

Pleaded for the Respondent.—1. The question in this dispute is, Whether the respondent shall recover the expenses incurred in making the demand against the appellant effectual? And, in considering this question, the *first* objection which occurs is, that it is incompetent to appeal against expenses merely. 2. But, even supposing the appeal were competent, the appellant admits, that if the facts stated by the respondent were true, the interlocutors complained of are well founded. He rests upon the facts set forth by himself, of which he craves a proof. But such a proof is unnecessary. 1. Because, with the exception of the fact that the respondent's servant went at the desire of the appellant to Mr. Nicol, and returned a second time to Kilry, every averment made by the respondent is either admitted or proved. 2. Because every allegation

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made by the appellant is either disproved by the letters produced and founded on by himself, or is contradicted by other averments made by him. Besides, the settlement of the claim on the part of the appellant with the respondent was a mere contrivance, to defeat the agent's claim for expenses, who was entitled to go on with the suit, to the effect of recovering these costs.

After hearing counsel,

THE LORD CHANCELLOR (LOUGHBOROUGH) said,

“ MY LORDS,

“ I am sorry that it has been necessary to bring the present appeal before your Lordships; the point which gives rise to it is of the smallest nature which I recollect to have come before this House. An appeal, where the matter at issue was very small, made some noise a good many years ago; the circumstances there were singular, and the appeal frivolous.* But, in the present case, there appears matter of serious consideration, and the judgment of the Court, if it remained, might be urged as a bad precedent. We must therefore consider what the justice of the case requires to be done.

“ I must own that I feel a considerable degree of favour towards the respondent, who has obtained several judgments of the Court of Session; I mean, towards the person who, loosely speaking, is termed the respondent; but the true respondent here is young Jameson the attorney in the cause, who, I conceive, has acted in a manner unworthy of the character of a Writer to the Signet, and the son of a respectable tradesman. As such, he ought *not* to have followed the course of proceeding which he has done in the present case.

“ The cause of action here was of a very trifling nature, £3. 5s. 10d., as the price of some bricks furnished by old Jameson to the appellant. The appellant not needing the bricks, they were given to a neighbour, a gentleman well known, Mr. Ferguson of Raith. The account for the bricks not having been paid, a servant of Jameson calls upon the appellant for the money, and is informed that the bricks had been given to Mr. Ferguson, and that if the servant called upon his gardener the bill would be paid. This was not done however, and a writer on the spot, one Anderson, is applied to, to recover the money from Beatson. This Anderson wrote to the appellant, and, it appears, that he also applied for payment to Mr. Ferguson's gardener, who referred him to the factor, and this factor, Anderson says, he should soon see upon the subject. It does not appear, however, that he did see him, and from the accidental negligence

* His Lordship alludes here to the appeal, Napier v. Macfarlane, which was for the price of an ox.—*Vide*, App. vol. iii. p. 649.

of Anderson, the account remains unpaid until it is taken up by young Jameson.

"He claps the appellant's name in a summons before the Court of Session, along with four other persons. On notice of this, Beatson writes to Anderson, and Anderson says in answer, he is surprised that Jameson should have done this without having given advice to him; and, he adds, that he was Jameson's creditor for a few shillings. But Mr. Beatson being alarmed, writes to old Jameson that he would be in Edinburgh soon and pay the account. He accordingly soon after went there, and called at the house of old Jameson, who was not at home, and paid the account to a person stated to be Mr. Jameson's head clerk, taking his receipt for the money. He took no release for the debt; it was therefore injuriously alleged that he had decoyed the clerk to discharge him. He talked to the clerk about expenses, but the latter declined to take anything, not recollecting perhaps that young Jameson could not make bricks without straw any more than the father. But after old Jameson had thus received the money, the son goes on with the proceedings at law against the appellant, and, while the appellant was suspecting nothing, takes a decree against him for the money which had been already paid, and for a bill of costs, amounting to £3. 11s. 3½d.

"Drawing the strictest line between the parties, the utmost that could be demanded of Beatson, was the expenses due at the time he paid the money, either incurred by Jameson, or what he was engaged to pay to Anderson. It became the Writer to the Signet to have acted with more caution. It is an established rule with the courts in this country, that if a defendant *contrive* to pay to the plaintiff, and take a release from him, without satisfying the attorney, the attorney having a lien upon the action for his bill, the Court will allow him to go on to a judgment to recover his costs; but always under this express qualification, that he gave notice of his demand to the defendant, who refuses or declines to pay: in no other circumstances would he be listened to for a moment. The courts here would not allow an attorney to carry on an action for the mere purpose of running up his bill of costs. If such a matter had come before the courts here, they would only have allowed Jameson the son, the bill incurred at the time of paying the money, and no other expenses.

"I had some difficulty here to state the judgment in this case, but I think it will be of good example to reverse all the interlocutors complained of, and allow the respondent the sum of £1. 11s. 1d. as the expenses due at the time of paying the money by the appellant."

It was accordingly

Ordered and adjudged that the interlocutors complained of in the appeal be reversed, except as to the sum of £1. 11s. 1d., to be paid by the appellant to the respondent, in full of the costs of his proceedings up to the

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1798. 26th of February 1794, when the debt of £3. 5s. 10½d.
 was paid.
 M'CALLUM, & C. v. For the Appellant, *Sir J. Scott, Wm. Adam.*
 CAMPBELL, & C. For the Respondent, *W. Grant, M. Nolan.*

NEIL M'CALLUM, Wright in Inverary, and
 HUGH MUNRO, Esq. of Stuckghoy, his } *Appellants;*
 Trustee, }

JAMES CAMPBELL, eldest son of NEIL CAMP-
 BELL, Esq. of Duntroon, and NEIL MAL- } *Respondents.*
 COLM, Esq. of Poltalloch, }

House of Lords, 12th March 1798.

PREScriptive POSSESSION—PROPINQUITY—BASTARDY—HEARSAY.

—A deed conveyed lands to a party, and the heirs male of his body, whom failing, to his nearest lawful heirs whatsoever. The property passed into the hands of a purchaser, but it was alleged that it had been acquired from one who was a bastard heir male. In a question raised by the heir general, nearly half a century afterwards, Held that the length of time, and failure in the proof of bastardy, made the title unquestionable.

The titles of the lands of Kilchoan, belonging to the appellant's ancestors, the M'Indeors, situated in the parish of Kilmartin, and county of Argyle, appeared by the old title deeds to have been conceived and demised in favour of heirs male.

At that period, the respondent Campbell's ancestors were the superiors of the lands, and had granted several charters and precepts of clare constat, conceived in those terms.

Aug. 12, 1725. Of this date, Patrick Campbell of Duntroon, the respondent, Campbell's ancestor, granted a charter of resignation, with consent of Neil Campbell his son, in these terms:—
 “dicto Nigello M'Indeor de Kilchoan in vitali reditu duran.
 “omnibus suæ vitæ diebus, et post ejus decessum, hæredi-
 “bus masculis legitime procreandis inter eum et Annam
 “M'Callum ejus sponsam; quibus deficientibus hæredibus
 “masculis legitime procreandis de ejus corpore, ullo subse-
 “quenti matrimonio; quibus deficien. Duncano M'Indeor in
 “Kilchoan, filio Patruï dicti Nigelli M'Indeor, et hæredi-
 “bus masculis legitime procreatis, sive procreandis de corpo-

“ re dicti Duncani M'Indeor; quibus deficien. proximis legitimis hæredibus masculis dicti Nigelli M'Indeor quibus-
 “ cunque; quibus etiam deficien. ejus hæredibus et assignatis quibuscunque.”

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M'CALLUM, &c.
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Neil M'Indeor, the liferenter in this last mentioned charter, died without male issue, and was succeeded by his cousin Duncan, the substitute named in the charter.

Duncan M'Indeor had only one son, Alexander. It did not appear that any title was made up in the person of this Alexander. But old Neil, the liferenter in the above charter, although he died without *male issue*, left an only daughter, who was first married to Donald Munro, upon whose death, without leaving issue, she was again married to John M'Callum. Of this marriage there was issue, the appellant.

In the meantime, both Neil M'Indeor, the liferenter in the above charter, and Duncan, the substitute therein, had died; and Alexander, only son of Duncan M'Indeor, died unmarried about the year 1746.

By his death without issue male, the succession opened to the appellant, in terms of the limitation in the charter on failure of heirs male, to heirs general of Neil M'Indeor.

But it was contended by the respondents, that as after the heirs male of the bodies of Neil and Duncan, the heirs male *whatsoever* of Neil are called; and as the said Neil had a brother, who died leaving male issue, from whom their author was descended, the heir general under the last limitation of the charter could not succeed, so long as such heir male of Neil existed. At Alexander's death in 1747, the property stood thus: one half was liferented by Ann M'Callum, Neil's widow; after her death, her daughter Mary was entitled to a liferent of one half. A fourth was liferented by the widow of Duncan M'Indeor. The other fourth was taken possession of by *John M'Indeor*, a cottager on the farm of Kintraw, without any title being made up, or any right to the property, but who, the respondents maintained, was the heir male of Neil M'Indeor.

In these circumstances, Mr. Campbell, as superior, entered into a transaction with these parties, by which he purchased the property or dominium utile of these lands from this John M'Indeor.

It seems that John M'Indeor could not write, and consequently the disposition was signed by two notaries; and was in the following terms: “ Forasmuch as Neil Campbell of Dun- Jan. 6, 1753.

1798. "troon, my immediate lawful superior, has instantly advanced, paid, and delivered to me, a certain sum of money. which, with the burden of the liferent after reserved, and debts after mentioned, is the full and adequate value of the lands after disposed, wherewith I hold me well content, satisfied, and paid, &c. Therefore I sell, annalzie, and dispo from me, my heirs and successors, to and in favour of Neil Campbell, his heirs male and assignees, heritably and irredeemably, all and whole the lands of Kilchoan," &c. Then follows a reservation of the liferents above mentioned.

Feb. 16, 1753. Of this date a precept of *clare constat* was granted to Mr. Campbell of Duntroon, setting forth: "Quandoquidem per authentica instrumenta et documenta coram me producta et ostensa, ac per me visa, lecta, et considerata, clare constat et est notum, quod quondam Nigellus M'Indeor de Kilchoan in vitali reditu, et quondam Duncanus M'Indeor in Kilchoan, filius patru ejus in feudo, obiunt ultimo vestit. et sasit. ut de feodo ad fidem et pacem S. D. N. in totis et integris duabus mercatis terrarum antiqui extensus de Kilchoan, cum domibus, &c. secundam certam per Patricium Campbell meum patrem, nunc demortuum in favorem dicti Nigelli M'Indeor in vitali reditu, et hæredibus masculis de ejus corpore legitime procreandis; quibus deficientibus, dicto Duncanus M'Indeor et hæredibus masculis et ejus corpore; quibus deficientibus, hæredibus masculis dicti Nigelli M'Indeor quibuscunque;" &c. Et qui Nigellus et Duncanus M'Indeor obiunt sine liberos masculos. Et quod Joannes M'Indeor, nunc in Kilchoan, est *legitimus et propinquior hæres masculus dicti quondam Nigelli M'Indeor de Kilchoan in terris aliusque subscript.*"

Feb. 19, — &c. Upon this sasine was taken; and thereafter an instrument
Feb. 23, — of resignation ad perpetuam remanentiam followed in favour of Mr. Campbell, and thus the property and superiority became consolidated in his person. Upon this title he possessed for 39 years without any challenge, the property having come in the interval into the possession of the other respondent by purchase. But action was raised in February 1792, at the instance of the appellant M'Callum, followed by another in 1793 at his instance, and also at the instance of the other appellant Mr. Munro, to whom he had granted bond, and upon which he raised an adjudication, and the whole question was discussed in the adjudication.

In defence, the respondents pleaded, 1. That there were

several persons in existence, who, in their order, would be nearer heir male to Neil M'Indeor; and the existence of any one heir male is sufficient to exclude the appellant, who claims as heir general, on failure of heirs male; 2. That John M'Indeor, who was infeft on the precept of clare in 1753, was the true nearest and lawful heir male of Neil M'Indeor. Answered, 1. That there were no existing heirs male of the deceased Neil M'Indeor, all the previous heirs male having failed, and left the succession open to the appellant, as heir general of the body of Neil M'Indeor. 2. That the John M'Indeor, from whom the respondents derived their title, was not a lawful or legitimate heir male—his grandfather, John Dow M'Indeor, having been born a bastard.

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A proof was ordered and taken, and, when reported, the Court ordered memorials. The respondents contended, 1. That the length of time during which they and their author had possessed this property, raised a strong presumption in favour of their right. 2. That the bastardy attempted to be fastened on their author was not proved—the proof having completely failed in establishing the fact of bastardy—the whole evidence consisting of hearsay, and the eldest hearsay witness speaking only to a period nearly 100 years after the party supposed to be a bastard was in his grave. 3. There were circumstances which showed that the persons in right of the appellant had acquiesced and acknowledged the title of the respondents' author.

By the appellants, it was contended, 1. That there were circumstances appearing from the title deeds produced by the respondents, which showed a want of title, and evinced a consciousness that their title through their author was bad. 2. That the bastardy of their author's ancestor was proved by the witnesses who were living at the time when their author took possession of part of Kilchoan, particularly by two surviving sons of their author. 3. The circumstances upon which the respondents ground an acquiescence in their author's title to succeed are unfounded, and admit of a satisfactory answer.

The Court “sustained the objections to this process of adjudication, and dismiss the same, and decern.” On reclaiming petition the Court adhered.

Nov. 15, —

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1. John M'Indeor, the author of the respondents, had no right to the lands of Kilchoan; he

1798. being of illegitimate extraction, as hath been proved in the course of the proof. In questions of pedigree, hearsay evidence is quite competent; and the general repute of the country as to the bastardy is conclusive against his right.

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When he took possession of these lands without any title, the appellant was an infant, and not able to assert his right. 2. The respondent Mr. Malcolm is not a *bona fide* purchaser without notice, of which the conveyance in his favour affords evidence. But even though he had been a *bona fide* purchaser without notice, his title rests upon the right of John M'Indeor, and that being bad, the title of the respondents falls with it, as flowing *a non habente potestatem*. 3. The appellant Neil M'Callum has right to the property under the last limitation of this charter 1725,—all the heirs male previously called therein having failed.

Pleaded for the Respondents.—1. The respondents have in their favour the presumption of law that every person is the legitimate son of his parents; Vide Ersk., B. III. Tit. 8, § 66; and Craig, B. II. Tit. 8. § 19.—A presumption fortified in this case with the fact of possession of the estate for nearly half a century. That John M'Indeor, Duntroon's author, and of course also John Dow M'Indeor, his grandfather, were male descendants of Kilchoan, is a point on which all the witnesses are agreed. The only question is, Whether it is proved that John Dow M'Indeor was a bastard, and not a lawful son, and consequently, whether the connection of the respondents' author with the property was only through a bastard line? The proof of bastardy lay upon the appellants, who have completely failed in that proof. They have only proved the existence of some loose and vague reports, a century after the bastard is said to have been in his grave; and the origin of those reports has been traced to a few individuals who had an interest to raise and propagate them. But there is not the slightest vestige of any one fact or circumstance, existing at or about, or near the time of the imputed illegitimacy, tending to establish the same, nor anything like a connected chain of tradition going back to the time when the person supposed to be illegitimate lived. On the contrary, in place of illegitimacy being proved, strong positive proof of legitimacy has indirectly come out of the mouth of the appellant's own witnesses, without their intending it. 2. The long time which has elapsed since the respondents' author entered into and possessed the lands without challenge, as well as the acquiescence

or acknowledgment for his right, ought to bar the present claim. 3d. By the practice of the Court of Session, the utmost weight is always laid on uninterrupted possession, and upon the long silence or non-claim of those who dispute the right of the proprietor; and it is of the utmost importance to the rights of a *bona fide* purchaser, that such effect should be so given to a title so possessed.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For the Appellants, *Sir J. Scott, M. Nolan.*

For the Respondents, *Wm. Tait, Mat. Ross, A. Campbell, J. Campbell.*

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DUNCAN
v.
RITCHIE.

ISOBEL DUNCAN, residing at Scone, a Pauper, *Appellant*;
JAMES RITCHIE, of Hoil of Scone, *Respondent.*

House of Lords, 2d April 1798.

REDUCTION OF SALE—FACILITY, FRAUD, AND CIRCUMVENTION—

BONA FIDE PURCHASER.—Circumstances where a sale of property was sought to be reduced on the head of facility in the granter, and lesion and circumvention in the grantee. Held the proof, which was conflicting, not sufficient to set aside the sale of the property in the hands of a *bona fide* purchaser from the party who was charged with the fraud.

The appellant's father, George Duncan, had, previous to his death, sold a small property to Robert Thomson, which was afterwards purchased by the respondent from him, for an adequate price paid.

After George Duncan's death, his daughter refused to remove from the property, which compelled the respondent to raise an action of removing before the sheriff; and the appellant, on her part, brought an action of reduction to set aside the conveyance by her father to Thomson, on the following grounds:—1. Facility in the granter of the disposition 1784. 2. Lesion and circumvention on the part of the grantee.

The Lord Ordinary allowed a proof; and, besides the proof, it appeared that the disposition was signed by the granter, George Duncan, on the first page, thus: "Gancan Garg Duimcan;" on the second page, it was "Georg Duncan;" on

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the third page, it was "Georg Duncan;" and on the fourth, "Georg Duncan."

On the proof, the respondent maintained, 1. That the facility and incapacity of George Duncan were not established. The appellant had stated, "that the natural imbecility of George Duncan's mind was increased by age and habits of intoxication;" but even if this were established by the proof, it would not avail her; because it would be too vague and indefinite to support the conclusions of the summons. The proof, when examined, he contended, did not even amount to this. The greater number of the witnesses, with the exception of one or two, spoke distinctly to his fitness in body and mind to take charge of his own affairs, and to transact business. One alone declared he was weak in body and mind. Another, that he could not be imposed upon except in drink. And many declared that he had the ordinary capacity at the time of the sale to transact business, and enter into a bargain regarding the sale of his feu. 2. As to lesion and circumvention, it was maintained that there was no proof of it. There was no inequality in the price—a full price having been given; and there was no deceit practised. 3. The respondent further rested his defence on this general plea. That as the reduction was founded on the fraud of Robert Thomson, this was not a ground of challenge which could affect *him*, a *bona fide* purchaser from Thomson.

The Lord Ordinary having reported the case to the Court, July 19, 1796. the Lords at first sustained the reasons of reduction, and reduced and decerned; but, upon reclaiming petition and Feb. 14, — answers, they altered this interlocutor, and "repel the reasons of reduction, assoilzie the defender, and decern, but "find no expenses due." In the action of removing, which was removed to the Court of Session, they also decerned the Mar. 1, 1797. appellant to remove from the subjects. And, upon bill of suspension against these decrees, the bill was refused by Lord Cullen.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—By the law of Scotland, facility in either of the contracting parties, when coupled with lesion in the matter of the transaction itself, is a relevant ground for voiding an agreement of sale. In the present case, these grounds of challenge have been established, not only by direct parole testimony, but by intrinsic evi-

dence, arising from the circumstances of the transaction itself. The respondent contends that the facility of the granter is not sufficiently made out, but, on a fair and impartial view of the import of the conflicting testimonies in this case, the weight of evidence is due to the appellant's witnesses, because they seem to be those who were better acquainted with his habits of life, and had more opportunities of judging of his capacity or incapacity. The signature too adhibited to the deed in question, which varies in its appearance and mode of spelling at the bottom of every page, is a circumstance of real evidence which leads to the same conclusion.

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Pleaded for the Respondent.—The respondent is a *bona fide* purchaser from Robert Thomson, and the reasons of reduction are only personal to him. 2. Even as against Robert Thomson, the grounds of reduction have, not only *not* been established, but have been completely disproved.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *Wm. Adam, W. Erskine.*

For Respondent, *Sir J. Scott.*

Writ of Error.

Messrs. EASTON, FRAZER, and Co., Licensed Distillers at the Bridge of Don, in the County of Aberdeen,	} <i>Plaintiffs in Error;</i>
GEORGE BROWN and Others, Commissioners of Excise for Scotland,	
	} <i>Defendants in Error.</i>

House of Lords, 3d April 1798.

DISTILLERY LAWS—DRAWBACK—WORKING ON SUNDAYS ILLEGAL.

—In a claim made by distillers in Scotland for a drawback on duty allowed for spirits distilled for exportation to England. Held, that by the words of the acts allowing the abatement “for every day” the still should work, did not include Sunday, though the distillers worked the stills on Sabbaths, it being a profanation of the laws with regard to the Sabbath, which hold it illegal to work on that day, and therefore that they could not claim a drawback on the duty for spirits made and distilled on that day.

This was a claim made by the plaintiffs in the Court of Exchequer for certain drawbacks under the distillery acts,

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BROWN, &c. for having manufactured spirits in conformity to the acts and distillery laws, applicable to spirits made in Scotland for export to England. They stated that they continued for 243 days to work their stills in the manufacture of spirits for export to the English market ; and, under the exemption contained in the acts of duty for spirits so made and exported, they were entitled to the drawback as applicable to 4284 gallons manufactured during those 243 days. The defendants objected to the demand, on the ground, that by a sound construction of the acts, the plaintiffs were not entitled to draw back more than a proportional abatement of the duty paid, that is, to receive, by way of drawback, a greater sum than what they had paid, and further, and in particular, no such abatement could be allowed for spirits manufactured and stills worked on *Sundays*—the abatement being applicable only to every lawful day such stills shall continue to work.

On trial before a jury, the jurors returned a special verdict, finding, that if the Court shall be of opinion that the plaintiffs were entitled to a drawback for working their still for every day, including Sundays, then they find the plaintiffs entitled to their demand ; but if the Court shall be of opinion that they are not entitled to charge for every day including Sundays, then the jurors find for the defendants.

Dec. 1, 1795. The cause came on to be argued on the special verdict ; and the Court of Exchequer unanimously gave judgment for the defendants.

Against this judgment the present writ of error was brought.

Pleaded for the Plaintiffs.—1. When the words of a statute are clear and unambiguous, there is no room for inquiring into the meaning or intention of the legislature in framing the statute. By the 33d Geo. III. c. 61, it is enacted, that for *every day* during which any licensed still shall be used in making spirits from British materials, the owner thereof shall receive an allowance of two-tenths on every gallon of the cubical contents of each still so used. The term “ every day ” can admit of but one meaning, and includes *Sundays* as well as any other day of the week. If the legislature intended not to give any abatement of the license duty for the Sundays on which the stills were used, that clause of the statute would have been differently worded. The legislature knew, that in all great distilleries at least, the stills were worked on *Sundays* as well as any other day of the week, and officers of Excise attended the works on *Sunday*, opened the scaled locks, the keys of which were in their

own custody, saw the stills charged, discharged, took an account of the spirits made, saw them put into the cellars, under their own *locks and keys*, and new locked and sealed the fastenings of the stills, in every way as on week days, without any objection whatever. The legislature would therefore have taken care to have expressed the act so as to have afforded *no* ground for demanding an abatement on account of stills being wrought on Sundays, if there was any intention of refusing the abatement upon account of work done upon *Sundays*. 2. But supposing it was unlawful to use stills for distillation upon *Sundays*, and that *Sundays* are not included in the general term "every day," the plaintiffs are still entitled to a part claimed. The number of Sundays in the period of 243 days was 34, which, being deducted, leaves 209 days for which they are entitled to abatement.

Pleaded for the Defendants.—1. The intention of the legislature, by the distillery laws referred to, was to place the duty on the manufacture of spirits both in England and Scotland on the same footing; and the abatements given to Scotch distillers for spirits made for the English market was solely allowed on this principle of reciprocity, and hence called the equalizing system. But here the plaintiffs make a most extravagant demand. The words of the act of Parliament are "abatement or allowance." These words evidently mean a sum subtracted from a greater sum, leaving a balance still due; but the abatement or allowance claimed by the plaintiffs far exceeds the duty they have paid. If a person owes £25,000 of duty, it is perfectly intelligible to say, that he is entitled to £20,000; but if a man owes £20,000 only, and asks to be allowed an abatement of £25,000, this is plainly absurd. This is exactly the case here. 2. Though the acts of Parliament only give the "abatement or allowance for every day which the stills shall work," they can be only understood to mean every *lawful* day which the stills shall work. In Scotland particularly, there are many strict and anxious laws with regard to the violation of the Sabbath. These have never been repealed, and not by the statutes in question; nor is it agreeable to the just construction of laws, to hold that one law repeals another merely by implication, unless the existence of the one is absolutely inconsistent with the existence of the other; but that is not the case in the present instance, because the acts in question may be justly interpreted in exact conformity with the other existing laws of the country against the profanation of the Sabbath, and that merely by supposing

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that the acts of Parliament in question, by the phrase, "abatement or allowance for every day which the stills shall work," meant every day which they shall work, *in conformity with the existing laws*, which is certainly to be presumed in all cases. Suppose a tradesman hires a journeyman for three or four months, at the rate of 2s. a day, would the journeyman be entitled, at the end of that period, to claim his wages for the *Sundays*? Certainly not! The answer would be obvious. That the master had hired him only for those days in which it was lawful to work. The case is exactly the same here, the Parliament must be presumed to have intended to give the abatement to the distillers only for those days on which it is lawful for them to work. The plaintiffs say it was customary for them to work on *Sundays*, and the officers of Excise may have been in the custom to survey on those days; but the answer is, that although it be not *lawful* to work on *Sundays*, yet, in point of fact, persons *may*, and certainly *can* and *do* work on *Sundays*; but they are subject to the penalties enacted by law against the profanation of the Sabbath. It is said that the legislature, when it meant to exclude Sundays, did so expressly, by using the words, "every lawful day," or "every day, *Sundays excepted*," and the plaintiffs have quoted acts where these words appear. But the answer is twofold; 1. Such anxious expressions in one or two acts cannot prove that the legislature in every other case meant to repeal the laws with regard to the profanation of the Sabbath. 2. In the acts quoted, the legislature was speaking of certain *acta solemnia*, and other proceedings which were to take place *de die in diem*, and where too the legislature had given no power of adjournment to the Court or other officer concerned, and therefore it was absolutely necessary specially to exclude *Sundays*. 3. It has been stated that if the plaintiffs' demand were sustained, they will draw back a greater sum than they paid in name of duty; in other words, they would receive a positive bounty; and yet the legislature has not provided any fund out of which such bounty falls to be paid. While it is clear, that if the distiller receives back more than he has paid in duty, he actually is paid a *bounty*. It will also be found that the abatement of $7\frac{2}{3}$ d. per gallon cannot be made to correspond with the amount of the license duty, without deducting Sundays. The calculation of the abatement of $7\frac{2}{3}$ d. per gallon per diem corresponds exactly with the annual license duty of £9 per gallon on the contents of the still, on the supposition of the still working 300 days

in the year. This leaves 65 vacant days; 52 of these are Sundays; 13 still remain: and the plaintiffs asked in triumph, how these were to be accounted for? but the answer was obvious. The stills required cleaning, and these 13 days are a necessary allowance for cleaning and repairing the stills. Such was the meaning of the legislature, and such has been the case in other acts; as, for example, the duties on soap, where the 13 days are allowed for cleaning.

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After hearing counsel, it was

Ordered and adjudged, that the judgment given in the Court of Exchequer in Scotland be, and the same is hereby affirmed. And that the record be remitted, to the end, that such proceeding may be had thereupon as if no such Writ of Error had been brought into this House.

For the Plaintiffs, *Henry Erskine, Wm. Adam, James Montgomery, Wm. Dundas.*

For the Defendants, *Sir J. Scott, R. Dundas, John Mitford, Charles Hope.*

NOTE.—This case does not appear to be reported in any collection. The statutes against the profanation of the Sabbath are:—1503, c. 83; 1579, c. 70 1592, c. 124; 1593, c. 163; 1594, c. 201; 1661, c. 18; 1663, c. 19; 1672, c. 22; 1695, c. 13; 1696, c. 31; and 1701, c. 11.

ADAM SMITH, and Others, Creditors of LIEUT.	}	<i>Appellants;</i>
JOHN NEWLANDS,		
JOHN NEWLANDS, Eldest lawful Son of the	}	<i>Respondents.</i>
said Lieut. John Newlands, and DAVID		
M'LAREN, Writer in Edinburgh,		

House of Lords, 26th April 1798.

LIFERENT AND FEE.—Deeds were conceived by the granter, conveying heritable estates to his natural son “in liferent, for his life—rent use only, (in another deed for his liferent use allenary,) “and to the heirs lawfully to be procreated of his body in fee.” Held, in a question with creditors, that the substantial fee was in the children, and not in the father.

Alexander Newlands had no heirs but a natural son; and, of this date, he executed a disposition, whereby he conveyed and disposed a house in Edinburgh, “to and in favour of

June 10, 1771.

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" Mrs. Grizel Mercer, sister-german of the deceased dame Janet Mercer, spouse of Sir David Wardlaw, bart., during all the days of her lifetime, for her *liferent* use only, and after her decease, to and in favour of John Newlands, my apprentice, *in liferent, for his liferent use only*; and to the heirs lawfully to be procreated of his body in fee; whom failing, to the nearest lawful heirs whatsoever of the granter."

By the same deed Alexander Newlands conveyed certain other heritable subjects at Silvermills, in these terms, " To and in favour of the said John Newlands, my apprentice, during all the days of his lifetime, *for his liferent use allenary*; and to the heirs lawfully to be procreated of his body in fee; whom failing, to my nearest lawful heirs whatsoever."

The party thus favoured under the description of my apprentice, was the natural son of the testator. He afterwards left his apprenticeship, entered into the army, and became Lieutenant Newlands.

Infetment was taken on these deeds in the precise terms of the above destination.

June 11, 1771. On the very next day he executed a trust deed, conveying his whole real and personal estate to trustees, for certain purposes specified. After these were satisfied, the trustees were directed to dispoise the heritable subjects, when he should arrive at the years of majority, " to the said John Newlands in *liferent*, for his *liferent use allenary*, and to the heirs lawfully to be procreated of his body in fee; whom failing, to my nearest lawful heirs whatsoever."

The truster died on 17th July 1771 thereafter, of a disease under which he laboured at the date of the deeds executed by him, and these were consequently reducible on deathbed, at the instance of the heir at law; but as there was no heir at law, it was deemed proper by John Newlands and the trustees, to apply to the crown, on whom these estates devolved as *ultimus hæres*, for a gift of the estate. A gift was applied for and obtained accordingly.

The trustees had denuded in favour of John Newlands in exact terms as above. And he having contracted considerable debts, the present question was raised by his creditors in a ranking and sale—that question being, Whether the right of John Newlands was a right of fee in the estate, so as to entitle his creditors to attach the same? The son of Lieutenant Newlands appeared by his tutor at law, contending

that his father had only a liferent, and that the fee was in him. The appellants, Lieut. Newland's creditors, on the other hand, contended that it was a fee in Lieutenant Newlands. That in all cases where a grant has been made to a person in liferent, and to his children or other persons *nascituri* in fee, the Court have uniformly decided *ex necessitate juris*, that the fee must be understood to be in the liferenter: That although, when a grant is made to a person in liferent, and to another existing nominatim in fee, the right of the former is a bare liferent, and the latter a substantial fee, yet where the disposition in liferent is accompanied with a grant in fee to persons *unborn*, the law rears up *ex necessitate*, and by construction an absolute fee in the liferenter, whereby he and his creditors are enabled effectually to disappoint the fiars.

The respondents maintained, that in the established practice and understanding of conveyancers, a grant of an heritable subject to a person in liferent, for his liferent use alienably, and to his children, or to other persons, *nascituri* in fee, imported no more than a bare liferent in the grantee, excluding him entirely from any right or interest in the fee for his own benefit. 2. That there did not exist in the law of Scotland any principle or any authority, which could authorize, far less compel courts of law to defeat the will of the testator. And that accordingly the will of the testator, where that is so unequivocally expressed as in this instance, must govern and have full effect. That there was no *necessitas leges* for any fee being in the liferenter, because, from the nature and form of conveyance, the case of a fee being in *pendente* could not apply. The superior can suffer no injury—the property can suffer no injury by reverting to the superior—for in the one case the superior has a vassal, in the other the property is vested and protected by trustees.

The Court ordained “the whole heritable subjects specially described in the two gifts of *ultimus hæres* to be struck out of the sale of the subjects belonging to Lieutenant Newlands, in so far as concerns the fee of said subjects, and decern.”*

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* Opinions of the Judges.—

LORD PRESIDENT CAMPBELL said:—“This is a question of a liferent and fee. The two gifts seem to be in different terms. As to the house in Edinburgh, it seems clear that an absolute fee is in

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On reclaiming petition the Court adhered.

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Lieutenant Newlands. As to the other subjects, the question turns upon the general point, so often agitated, What is the legal import and effect of "*Liferent allenary*?"

"One point to be considered is, what is the nature and legal import of what is called a *fiduciary* or trust fee in the nominal life-renter, and what particular form of words is necessary to constitute such a fee? If the words are, to such a person in *liferent*, for his *liferent* use, and to the heirs of his body in fee, does this mean something different from the same words with the addition of *allenary*, or only, or merely, or any such expression adjoined to the words *liferent* use?"

"In arguing the case of *Frog* (*Frog's Creditors v. His Children*, Nov. 1735; M. 4262), Mr. Ferguson of Pitfour seems to have been at a loss about this, and gave it a go-bye, by saying that 'the idea of a *fiduciary* fee in that settlement was an imagination, as it contained no restriction in words other than that of *liferent*, which meant *fee*. 'Trusts must be plainly expressed, and not left to be gathered from 'remote circumstances,' &c. All this may be true, but it does not go directly to the point, nor explain with sufficient precision how the line is to be drawn between one form of expression and another. The case of *Forbes v. Forbes*, observed by Lord Kames (Select Dec. 3d Aug. 1756), goes nearer to the point, and seems pretty plainly to establish that there may be cases where the word *allenary* ought not to be considered as making any difference one way or other.

"In the case of *Frog*, it was ultimately found that there was a fee in Robert Frog, and that his onerous debts and deeds were effectual to carry that fee, yet he was *ex figura verborum* no more than a *liferenter*, and the fee was nominally in the heirs to be procreated of his body, whom failing, &c. But the Court thought that the fee could not be in heirs unborn, and uncertain. It was, on the one hand, given away from the granter, and, on the other hand, could not be in *future* heirs. It could rest no where but in Robert Frog. The question was well considered, and solemnly determined, and ought for ever to be at rest.

"But two inferences have been raised upon that decision, neither of which are found in the express terms of it, and both of which are attended with difficulty.

"1. It is supposed on one side of the argument, that the fee, in such a case, where we have no other words of restriction except *liferent* and *fee*, is equally absolute, and equally unlimited in the person of the institute, as if he had been called to the fee in express terms,

Pleaded for the Appellants.—In a deed regarding real estate, even though made *mortis causa*, it is not sufficient that the intention of the granter appear. The conveyance must be construed agreeably to feudal principles; and feu-
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without any mention of *liferent*; in so much that even his gratuitous deeds of settlement must be effectual to carry it away.

“ 2. On the other side, it is maintained, that if to the word *liferent* we add a few superfluous terms of the same import, such as the word *only*,—the word *merely*,—the word *allenary*, though we neither add to, nor take away a syllable from the subsequent clause of fee, we produce so wonderful a change, that instead of a pure and unqualified fee in the person of the institute, subject even to gratuitous deeds, we divest him of every right, title, or interest, except that of a bare usufruct, and exclude his most onerous creditors, or dispoonees, from any access to attach the subject. This is the more extraordinary, as we still leave a fee in him, i. e. we leave the estate in him; but, to reconcile this inconsistency, we call it a *fiduciary fee*; meaning to assimilate it, by the use of this word, to the case of an estate conveyed to a stranger for certain ends and purposes, and where it is certain that no more than a trust estate vests; but where it is equally certain that there is a co-existing *substantial* fee, which can no more be *in pende*nt than a trust fee, but must rest somewhere, as indeed all property must; for, independent of feudal ideas, it is a contradiction in terms, to suppose property without a proprietor. An estate descending from the ancestor to the heir, or conveyed by family settlements, can never be a *res nullius*; for by the law of Scotland, if it can find no other owner, it would belong to the king.

“ The Court, in the case of *Frog*, having found the fee to be in Robert *Frog*, and not in the heirs unborn, it was a necessary consequence that his onerous debts and deeds were found also to attach upon it. But the Court had no occasion to decide in a question with *heirs*, whether the restricting words, short and simple as they were, did or did not lay him under an obligation in their favour. Had his grandmother given him expressly the fee, but only said, ‘ I mean, that failing you, it shall go to the other heirs and persons named in the deed, and I desire that you shall not defeat their hope of succession;’ even this, though a weaker expression of her intention, would have barred him from altering gratuitously. She did the same thing more emphatically, by restricting him in words to a *liferent*, which was the strongest possible signification of a will that he should not dilapidate or defeat, but allow the succession to take place as devised by her. But the Court justly thought that no such form of expression could bar onerous creditors or purchasers from attaching the fee in his person.

1798. dal forms, and apt terms of conveyance must be used ; and
 SMITH, &c. whatever be the known and recognized construction of these
 v. terms of destination, they must have effect ; and it is clear
 NEWLANDS, &c. by them, that the granter never meant to restrain the inte-

“ Suppose then she had added to the word *liferent* a few of those anxious synonymes above noticed, would this have made *his* right, or that of subsequent heirs, or of any one concerned, either stronger or weaker ? It is thought not. In the case of Newlands we have different modes of speech used in the two different gifts, which, however, both parties seem to think, and with reason, mean one and the same thing. But, let the form of the words be what it will, if the fee be in the institute heir, or first person called in the settlement, or in any other person called after him, the onerous debts and deeds of that person must attach upon the subject, although it may be very true that, by contracting such debts, and doing such deeds, he counteracts the will of the granter ; and an action may lie against him to purge incumbrances, as in the case of an entail which is defective in one or other of its clauses, or left out in the investitures, or not recorded in the register of tailzies.

“ The words *liferent* *allenary*, &c. are not *verba significata*, which by their force and effect exclude the vesting of the fee. It is admitted that the fee vests ; but they are strong and anxious expressions of *will*, which are entitled to every effect and operation that *will* can have in such a case ; but the effect of *will* to qualify a fee in an institute or substitute heir has already been exemplified.

“ It is said he was a *fiduciary* *fiar*. This is a term which has been invented to obviate a difficulty, but it just leaves the matter where it was. For whom is he fiduciary ? For himself in *liferent*, and the heirs of his body in fee, i. e. *for himself in fee*. A *fiduciary* *fee* implies a *substantial* *fee*. Where then is the substantial fee ? Is it in heirs unborn, and who never may exist, and failing them in the king ? Such a proposition cannot be maintained. The substantial fee, in the case of such a settlement, is, and must be in the fiduciary *fiar*, because it can exist no where else.

“ There are cases of *nominal* fees, which are distinct from the actual or substantial fee, e. g. if I have sold my estate and granted a disposition with procuratory and precept, and the purchaser is infeft upon the precept, but has not yet taken the necessary steps to make his base infeftment public, I still have in me a naked nominal fee in consequence of the anterior feudal investiture in my person, but which will vanish as soon as complete feudal titles are made up in the new proprietor, and in the meantime the substantial fee is in him.

“ In like manner, if I dispoise my estate in trust to a stranger, for ends and purposes, e. g. to pay my debts, or to raise a fund for family provisions, &c., and the trustee is infeft, here are two distinct fees,—the trust fee is in him till the ends of it are accomplished, but

rest of John Newlands, his infant son, and only child, to a naked liferent, or a fiduciary fee ; and therefore, in effect and in law, the destination to him in liferent, and to his children unborn in fee, gave a substantial fee to the father ;

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the substantial fee remains with myself, and from me will descend to my heirs. If I am a freeholder, I will continue to vote in right of my substantial fee. My heir apparent, after my death, will do the same, as happened in the case of Sir Alexander Campbell of Ardkin- las. The trustee in that or in any other case of the kind, has no right to the estate, directly or indirectly, except what the trust gives him. He cannot vote as a freeholder—he cannot bring a shilling of his own debt upon it. The estate is not his but mine. He is a mere name for me, and for my creditors, &c. in terms of the trust. Yet the fee in him is far from being *nominal* in the sense of the preceding case, neither is it a liferent *allenary*. It is an actual fee ; but it is consistent with the substantial fee being in the truster, or the heirs of the truster.

“ In this case of Newlands we have a trust of this kind, which, by the settlement, was to last a certain number of years. Now, for whom did these trustees hold the substantial fee of the subjects in question ? They held it for the heirs in the settlement, i. e. for the granter's son, who is called the fiduciary fiar, and for the heirs of his body, &c. Ergo, the trust fee was held for the fiduciary fiar, and the heirs of his body ; and why were the trustees only to hold it till his age of 21, and then to denude in his favour, if they were to give him nothing ? This is a strange jumble, if we hold this fiduciary fiar to be neither more nor less than another trust fiar, holding the fee again in trust ; the difference being that these first trustees did not hold the estate for themselves at all, but young Newlands holds it for himself in the first instance ; and perhaps there neither does, nor ever will exist, another person for whom he will hold it, the king excepted.

“ If the subjects were sufficient for a freehold qualification, would he not be entitled to be enrolled and to vote ? Who is entitled to hinder him ? If he had only a trust fee in the proper sense, or a merely nominal fee, or a liferent of no fee which exists in any person, it is thought this would be a very new sort of qualification. But it is admitted that the liferent which he has in words is a liferent upon a fee which *is in himself*, and therefore he would claim to be enrolled in virtue of his own fee, or the liferent of his own fee, and if this be not a substantial fee, it would not be a good title ; but it is enough to say, that if he has not the substantial fee, there is no other person existing who can have it.

“ Besides, the argument on the other side would be establishing a new kind of tailzied fee, not yet acknowledged in the law of Scotland. A trust in a man's person for the heirs of his own body, who

1798. To this effect it makes no difference whether the phrase be
 SMITH, &c. in liferent, or in liferent allenary. As to the doctrine of
 v. fiduciary fees, these, if established, would be attended with
 NEWLANDS, &c. much inconvenience, and so prejudicial to commerce, as to

may never exist, cannot in its nature receive execution. If a trust or fiduciary fee may take place in the first institute, the same form may go through all the substitutes; and accordingly, in the case of Thomson, we have various substitutions, all in the same terms. Every heir may be declared a fiduciary fiar, or a liferenter allenary for the succeeding heirs. If this alone be sufficient to qualify the right, what use is there for the act 1685? and for clauses prohibitory, &c.? We at once introduce the statute *De Donis Conditionalibus* (13 Ed. I.) into the law of Scotland, and the record of tailzies becomes useless.

“The case of *M’Nair* (M. 16,210) was an alarming example. The Court, 28th June 1791, refused *in hoc statu* to reduce at the instance of the institute heir himself; but if ever it comes back on a question with a creditor, it will deserve the most serious attention.

“With respect to legacies and personal provisions there is much less difficulty, because we have no feudal rules, nor security of records to stand in the way of giving full effect to the will of the granter. The chief thing to be attended to there is to avoid nice and subtle distinctions as much as possible, and to give as little room to arbitrary decision in construing the deed upon which the question arises.

“In all cases where the granter provides for his own issue or heirs, whatever be the form of words he uses, it ought to be understood that he does not mean to divest himself of the fee, and put it in them, but that they must take as representing him, or as heirs of provision to him, subject to his debts and deeds; though if it be a provision by contract of marriage, the children will also be *quodammodo* creditors to the effect of setting aside gratuitous deeds, and perhaps of competing with other creditors. Vide Dict. *voce* ‘Provision.’

“Where the provision or bequest arises from a third party, e. g. to A. B. in liferent, and the heirs of his body in fee, or to A. B. in liferent allenary, or any such form of words, no gratuitous deed of A. B. ought to interfere with the plain intention of the granter, that the succession may take place in the manner devised by him; and it is idle to talk of a distinction between one form of words and another. Liferent allenary owed its introduction to the case of conjunct fee and liferent, for it is natural there to use the expression to A. B. and his wife in conjunct fee and liferent, for her liferent use allenary, which is no more than saying, ‘Although I give her in words a conjunct fee, I mean truly to restrict her to a liferent only. This is all

entitle them to no countenance from law. Where real estate is conveyed to one in liferent, and to his children *nascituri* in fee, as in this case, the absolute and unlimited fee vests in the father, by the principles of the law of Scotland. 1798. SMITH, & CO. NEWLANDS, & CO.

that is meant in the case of Thomson v. Lawson, 4th Feb. 1681, (M. 4258), observed by Lord Stair; and all that Mr. Ferguson of Pitfour meant in his argument in the case of Frog.

“As to onerous deeds. If there be a power of uplifting, there must of course be a power of squandering; if not, the assignment of a personal right, such as a bond, will not put the assignee in a better situation than his author. Gibson v. Arbuthnot, 4th February 1726; (Mor. 12885); Marjoribanks’ Creditors v. Marjoribanks, Feb. 1682, (Mor. 12891); Mure v. Mure, 29th June 1786, (Mor. 4288); were wrong decided.

“As to feudal rights. In the case of Douglas v. Ainslie, 9th July 1761, (Mor. 4269), the words were, to Ainslie *in liferent* during all the days of his life, and to his children in fee. This was found a fee, and that he could sell. In Cuthbertson v. Thomson, March 1, 1781, (M. 279), the destination was to Ann Cassels *in liferent during all the days of her lifetime*, and her children in fee. The fee was found to be in her. In Ross v. Rosses, March 8, 1791, (*Vocce Fiar, Vide App. to Mor. Dict.*), the question was among heirs; and the words of restriction were very strong.”

LORD ESKGROVE.—“I think it dangerous to depart from the received construction of such destinations—conjunct fee and liferent. If the case of Frog were entire, I would doubt about finding a fee in Robert Frog. Why should the interest of the superior have any effect on the settlement of the vassal? I would rather hold the estate to be in the granter. In the case of Graham in 1759, the father was infeft in liferent only, and it was found that an heritable bond granted by him was not good. I see no harm in a succession of liferents. Creditors are out of the question; for why should they contract with a liferenter. The words *allennarly, &c.* have received a certain construction, and we ought to adhere to it.”

LORD JUSTICE CLERK (M^QUEEN).—“I am of the same opinion. When I first came to the bar, a disposition to one in liferent for his liferent *use allennarly*, was universally understood to vest merely a liferent, with a fiduciary fee in the liferenter, in compliance with the rule, that a fee cannot be *in pendente*; and it would be most unjust to alter this now, for there are a thousand estates in this country settled in this way, in perfect confidence in this rule, which, had there been a doubt upon the subject, would have been settled on trustees. The will of the granter must be the governing rule as to his succession. No principle will give the estate to one to whom the granter has not given it. When he gives an estate to his son in liferent, and the heirs of his body in fee, the natural construction is, that he

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land, and by the solemn decisions of the Court of Session, which have been considered now for sixty years to settle the point.

Pleaded for the Respondents.—The intention of Alexander Newlands to bestow on his natural son only a bare liferent in his real property is incontestible, from the different deeds above recited, wherein he uses the terms liferent only as allenary. This being the plain language of these deeds, and there being no *necessitatis legis* in this case, to give the fee to the liferenter to satisfy the feudal maxim, that a fee cannot be *in pendente*, it is incompetent for courts to create

really means a fee in the son. If the words allenary be added, he means that his son shall not spend the estate, and the son's interest is confined to a liferent. Suppose he says, my son shall have no fee in him, *fiduciary* or *otherwise*, Is he still to have a fee? I cannot assent to such a proposition."

LORD SWINTON.—"It is of the nature of a *fiction juris* to assume a proposition *contra veritatem* from conveniency. The trust here is for the sake of the superior."

LORD DREGHORN.—"There is no charm in the word allenary. If tantamount (equivalent) words are used, it is enough."

LORD METHVEN.—"The restrictions on property are to be strictly interpreted. I think the words of restriction not sufficient in heritable rights."

LORD PRESIDENT.—"I am for finding, for the reasons above stated by me, that the word allenary makes no difference, and that creditors and purchasers may attach in such a case."

LORD HENDERLAND.—"Of the same opinion."

LORD METHVEN.—"Of the same opinion."

LORD JUSTICE CLERK.—"In the case of Sir Alexander Campbell alluded to, the estate was not *wholly* made over to the trustee, but only partially; viz. for certain purposes, and a substantial estate remained. But here the whole estate is made over."

Vide ante, vol. iii. p. 201.

LORD PRESIDENT.—"If that be the case, then the *whole* is in Lieut. Newlands. The whole must be in him, either in one character or another, or rather, we may say, the whole fee is vested in him, both fiduciary and substantial, without any destination or separation, other than an ideal one, consisting in words merely, not in fact. The argument therefore, with submission, runs into a metaphysical nicety which we find it impossible to extricate. The estate being in Lieut. Newlands, must, at his death, be taken out of him by a service, or perhaps by a charge to enter, given to his son, as next heir, which is equivalent to a service."

"The Lords ordain the whole subjects to be struck out of the sale."—President Campbell's Session Papers.

by construction an unlimited fee in the person of the life-renter.

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After hearing counsel,

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The LORD CHANCELLOR LOUGHBOROUGH said :—

“ My Lords,

“ When I had first occasion to consider this cause upon the case of the appellants, and a very accurate written note of the opinions delivered by the judges below, in addition to the printed report of the case, I was very much impressed with the importance of the case, and entertained great doubts as to the grounds upon which the decision had been given. I therefore thought it proper that the hearing should be postponed, till the judgment could be supported on the part of the respondents. A case had accordingly been put in for him, and the result of the argument which followed upon it, had not been to remove the doubts which the first consideration of the case had raised in my mind. But I am happy, notwithstanding, that the discussion which the case had received has taken place, because it marks the attention of the House to the business which comes before them, and their anxiety not to be rash in forming an opinion, where questions turn upon points peculiar to the law of Scotland.

“ To state the question, as distinctly as it is capable of being stated. These propositions have been agreed upon in the argument which has been maintained :—That if a conveyance is granted to a person *in liferent*, and thereafter to the heirs of his body *in fee*, then such person must of necessity be *fiar* :—It is also an agreed principle, recognized by the law of Scotland, that a fee cannot be *in pendente* or in *abeyance*. But the distinction which has been contended for by the respondents is, that if words are used which go beyond a mere declaration of *liferent*. If the word *allenerly* is added after the words, *in liferent for his liferent use*, then a mere *liferent* takes place in regard to the first dispositive, and the *fee* is to be, I cannot tell, according to the argument, distinctly where. It is by implication a fee in the first taker, which gives him some species of interest, coupled with some species of trust for his children, when they come into existence.

“ This distinction, which the counsel admitted could not be maintained in reasoning or on principle, does not add one distinct idea to the limitation. Yet the Court of Session thought that such effect had very generally been understood to be given to that word, and in particular, a very learned judge of great authority, who commenced practice at a very early period of life, had declared, that such had been the understanding ever since he remembered any thing, and that individuals had acted upon this supposition ever since. It was also observed, that though such understanding could not be stated to have been come up to, by any express decision upon this particular point

1798. yet it had been a familiar idea, upwards of a century ago, that there was such a difference as had been contended for in the present case.
 SMITH, &c. In a case reported by Lord Stair, in the year 1681, this distinction was mentioned. I do not take it, that it was there stated as the mere argument from the bar ; but I conceive that in this, as in other cases reported by Lord Stair, where a principle adverse to the decision was stated, it was an opinion thrown out by the Court.

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“ These things considered, and that the judgment gives effect to the intention of the testator, which in equity ought always to be supported as far as it can be done consistently with rules of law, though I feel no conviction,—though my mind inclines to doubt exceedingly, whether the judgment proceeded on safe grounds, yet I own I have not courage to venture upon a reversal, when I am told by a person of such high authority, that the effect of such reversal would be, to put numerous settlements, made even in the course of his own experience, in a situation in which they were not understood by the makers of them to stand. I would therefore have it understood that this consideration alone restrains me, and I would wish that the Court would, in some future case, proper for the purpose, reconsider the principle of their judgment in this case, which, in consequence of this high authority, I think it more safe for the present to let remain unaltered, in the hope that the question may afterwards come again before the Court, to be more maturely settled.”

It was therefore

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *W. Grant, J. Anstruther, Chas. Hope.*

For Respondents, *Wm. Adam, Ad. Gillies, A. Fletcher.*

JAMES ROBERTSON of Lude, Esq., . . . *Appellant ;*
 HIS GRACE THE DUKE OF ATHOLL, . . . *Respondent.*

House of Lords, 2d May, 1798.

PROPERTY—PART AND PERTINENT—SERVITUDE OF PASTURAGE—

SUBMISSION.—In a dispute as to the property of certain grazing grounds on the confines of Atholl Forest. Held, (1.) That the property of these grazing grounds belonged to the Duke of Atholl, as part and pertinent of Atholl Forest ; but that the servitude of pasturing and grazing sheep, cattle, &c., belonged exclusively to the appellant, (whose barony marched with the Duke's), but subject to the Duke's right of deer hunting thereon. (2.) That when the Duke gave notice of his intention to hunt, the appellant was bound to remove his cattle in order to leave the grounds clear for that purpose. (3.) That the decree arbitral settling these disputes must have effect, and be final.

This was a suspension and interdict brought by the appellant, to interdict and prohibit the respondent from hunting over certain lands which both parties claimed as their property, situated on the confines of Atholl Forest.

The respondent, in the year 1795, had charged him upon a horning, raised on a decree arbitral, to obtemper and perform the same, in all its clauses, in regard to the respective rights of the parties as ascertained therein, in regard to these lands; whereupon the appellant brought a suspension of that charge, and made the following statements in regard to his right to the grazing or pasturing grounds and shealings in question.—That the barony of Lude at one time was totally disconnected with the Atholl family, his ancestors being the vassals of the crown. Thereafter the barony became the property of Mr. Campbell of Glenorchy, and was by him again conveyed to the appellant's ancestors to be held in feu; and in 1666 the *superiority* was acquired by the family of Atholl.—That disputes arose soon after between the Atholl family and that of the appellant, with regard to certain shealings, that is, grounds situated in the remote and mountainous parts of the country, which are used in the summer season only, when the cattle are removed to them, and the keepers erect huts, called shealings or bothies, for temporary accommodation.—That the Atholl family claimed the shealings in question, as parts of the domain or Forest of Atholl—a tract of country which extends about twenty-four miles in length to ten miles in breadth. This was their hunting field, and sufficiently broad, but did not entitle them to encroach on the property of their neighbours.

In order to end these disputes, it appeared, that, of this date, their ancestors had entered into the following agree-
Dec. 5, 1716.
ment:—"That, for removing all differences betwixt them
"concerning the shealings, grazings, and pasturage after-
"mentioned, and for regulating their respective possessions
"thereof for the time to come, have condescended and agreed,
"as by these presents the said John Duke of Atholl con-
"descends and agrees, that the said John Robertson of
"Lude, his heirs and successors, shall, for hereafter have the
"shealings of Craggangorm, Aldnaherry, Bienacloick,* Bie-
"nahilrig, Byhoallen, Leadnacallad, and Strondias, graz-
"ings and pasturage thereof, as the same are limited and

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* In the respondents case, Rienacloick, Rienahilrig, Riethocollen.

1798. "bounded in manner underwritten, (here the boundaries
 "are described), and that for the grazings of his own and
 ROBERTSON "his tenants' horse, nolt, sheep, and goats allenary, but no
 v. "ways for tilling and labouring; with this provision and
 DUKE OF "condition, that the said John Robertson and his tenants
 ATHOLL. "shall keep and observe the ordinary time of going to and
 "coming from the shealings with their bestial yearly, that is
 "observed by the rest of the country in coming and going
 "to their shealings, and shall not keep any sort of dogs
 "within the said bounds; and likewise providing, that it shall
 "be always lawful to his Grace and his successors, or
 "any others empowered by them, to seize and apprehend
 "any of the bestial that be found pasturing without the
 "bound foresaid here condescended upon, as any other
 "bestial uses to be taken within the forest of Atholl; and
 "providing likewise, that nothing herein contained is to
 "hinder and prejudice his Grace and his foresaids in their
 "right of hunting on the said grazings and shealings, as he
 "and his predecessors have been in use to do anytime here-
 "tofore. Likeas, on the other part, the said John Robert-
 "son, by these presents, passes from all claim or pretence
 "he has unto the shealings of Renagoy and Braedandearg,
 "with the grazings and pasturage of the same in all time
 "coming; and obliges himself, his heirs and successors, to
 "pay to his Grace and his foresaids yearly, two sufficient
 "wedders for each of the said shealings of Craggangorm,
 "Aldnaherry, Bienalock, Renahilrig, Rethoiollan, Leadna-
 "callad, and Strondias, being in whole fourteen wedders,
 "and that at the term of Lammas yearly, beginning the first
 "year's payment thereof at Lammas next, and so forth at
 "the said term, in all time coming; and whenever his Grace
 "intends to hunt upon the grazings and shealings foresaid,
 "the said John Robertson obliges himself and his foresaids,
 "upon due advertisement given him, to remove his own
 "and tenants' bestial therefrom, eight days off before the
 "hunting begins; but prejudice to him nevertheless, after
 "the hunting is over, of bringing back to the said grazings
 "and shealings their said bestial to pasturage and graze
 "thereon, during the ordinary time before mentioned."

It was alleged that nothing explicit appeared as to the right of property in this agreement; but the appellant contended that a right of property was to be implied in him, from the expressions, that he was *to have them thereafter*. He further stated that this agreement had been entered into by the then

proprietor of Lude, while committed for high treason, and under the charge of the Atholl family, and was granted by fear and by coercion. He also founded on the acts of Geo. the First, c. 54, for the more effectual securing the peace of the Highlands of Scotland, declaring that all clauses in charters or agreements, whereby personal services of hosting, hunting, and watching and warding, are agreed to be payable, are done away with, and a certain sum of money ordered to be paid in lieu thereof. He stated, that his obligation of personal service to remove his cattle, and leave the grounds free to the respondent for the purpose of hunting, was, by that act, rendered null and void.

It was further stated that he, in the year 1760, had entered into a submission of their respective rights with the late Duke of Atholl, whereby they referred to the final sentence and decree arbitral to be given and pronounced. "All and sundry questions, claims, and differences standing between them to John Mackenzie, Esq., W.S."

It further appeared, that, under this submission, the arbiter had pronounced a decree arbitral, finding, 1. The above contract or agreement of 1716 "to be a subsisting and effectual deed, June 18, 1761. binding on both parties and their heirs, for regulating the respective rights and interests of the seven shealings or grazings in all time coming. 2. That the property of the said seven shealings, (subject to the servitudes after mentioned), did, and does belong to the said James Duke of Atholl and his foresaids, as part and pertinent of their forest grounds of Beneglo, &c., which are parts and pertinents of the Forest of Atholl. 3. That James Robertson of Lude, and his heirs and successors, have the sole right and servitude of shealing and pasturage of and upon the seven shealings, whereof the right of property is hereby ascertained to be in the said Duke of Atholl, and that for the purpose of grazing and pasturing of the said James Robertson and his tenants, their horses, nolt, sheep, goats, milk cows, oxen, bulls, stots, &c., but that they cannot take other peoples cattle to pasture thereon. And that the Duke cannot hurt or prejudice the said right of servitude, by grazing or pasturing his own cattle, but has right to hunt thereon, as in the said contract, giving notice to Mr. Robertson to clear the grounds of his cattle for that purpose."

Matters remained in this posture until 1791, when the respondent gave the appellant notice, eight days before, of his intention to hunt on these grounds, so that he might remove his cattle therefrom. The appellant declined to com-

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1798. ply with this request, and brought a suspension and interdict. Interim interdict was granted, and the bill allowed to be answered. No answers were lodged; and the matter lay over in this state until the charge given on the horning in 1795, when the present suspension and interdict was brought.

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The Lord Ordinary “repelled the reasons of suspension; “Finds the letters orderly proceeded in terms of the decreet “arbitral charged upon, and decerns accordingly.” And, on repeated representations, the Lord Ordinary adhered.

A reclaiming petition having been brought, in which the appellant contended that it would be extremely hard if his right to these grazing grounds was to be subject to a course of hunting whenever the Duke pleased. That such a right, exercised even more than once in a year, would be tantamount to destroying the right of pasturage altogether. That even if exercised once in every year, it must entail heavy expense upon the appellant and his tenants, and that the Duke’s past possession or exercise of this right had never been according to this measure of his right, but only at long intervals.

Whereupon his Grace’s counsel gave in this minute, “Mr. Charles Hope, for the Duke of Atholl, represented, that “though the Duke’s right of deer hunting was unlimited, “yet he had never exercised it in an emulous manner, and, “to avoid every supposition that it might be so exercised in “future, he, as counsel for his Grace, did agree that Mr. “Robertson’s sheep, cattle, and bestial, should not be removed from the pasture, in order to said deer hunting, “oftener than once in every year or season, and should be no “longer kept from the pasture than eight days at a time, “exclusive of the eight days they are to be removed previous to such hunting commencing.”

The following interlocutor was thereupon pronounced :
Jan. 31, 1798. “The Lords having advised the petition, and answers thereto, “and the foregoing minute, find that the decreet arbitral in “question was a legal and valid transaction, and must have “effect; reserving to all parties concerned the right of “complaining, if any attempt shall be made to exercise the “privileges therein specified in any oppressive manner, or “contrary to the act 1 Geo. I. c. 54. Find that the right “of hunting, as explained and restricted by the said minute, “is not contrary to the statute, and therefore find the letters orderly proceeded, and decern.”

A further concession having been conceded to the appellant, the Court again pronounced this interlocutor : “Of con-

Feb. 20, 1798.

“ sent, find that Mr. Robertson’s sheep, cattle, and bestial, shall not be removed from the pasture in any year, sooner than eight days immediately preceding the 1st September yearly, when the hunting may commence, and not sooner ; and, with this variation, adhere to their former interlocutor reclaimed against, and refuse the desire of the petition.”

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Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The obligation alleged to be incumbent on the appellant, to remove his cattle from the pastures when the noble respondent desires it, even if it were legal, cannot be enforced in the way attempted, to which the Court has given its sanction by the decree appealed from. That obligation was created by, and still rests on the instrument or contract 1716. The award of 1761 makes no order upon the subject, but only says, “ That the right of pasturage shall be exercised, without prejudice to the Duke’s causing Mr. Robertson and his tenants remove their cattle when a deer hunting is intended, in terms of the contract.” It seems perfectly evident, therefore, that the respondent, to attain his object, must proceed upon that contract, and not upon the award. But, neglecting the suspension and interdict obtained in 1791, and without any previous notice given in terms of the contract 1716, the respondent has chosen to proceed by charging the appellant upon the award of 1761, to perform generally what is thereby incumbent upon him, and to pay the penalty as for nonperformance, and the Court finds the letters orderly proceeded, that is, that the charge given, though explained to relate to a matter *out of the award*, is regular, the consequence of which is, that the appellant must do whatever the respondent desires, or go to gaol. He submits that the respondent ought to have proceeded by way of a regular action laid on a breach of performance alleged, which in the course of the action must be proved. It is impossible that the appellant can be compelled actually to remove his cattle, and it is equally impossible that he can force his tenants to remove theirs, which shows the erroneous nature of the present proceeding. If the appellant is under a legal obligation, and does not perform after notice, the respondent may summon him for damages, but not otherwise. 2. If the rights and interests of the parties in the soil or property, and in the use of the lands in question can be inquired into

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at present, they must be taken as explained or ascertained by the alleged contract 1716, and the decree arbitral 1761, the parties not having brought any reduction of those instruments. The dominium or property is declared to be in the respondent, but the substantial and exclusive beneficial interest is adjudged to be in the appellant as *a right of servitude*. Strange and anomalous as this must appear to be to every person acquainted with the tenures and mode of conveyancing in Scotland, and still more strange, when a servitude of hunting in favour of the respondent is found to be ingrafted on the servitude of pasturage—showing thus a servitude upon a servitude; yet things must be considered as on this footing; and the question is, Whether the obligation on the appellant to remove his sheep, &c. from the pastures whenever the respondent signifies his intention to hunt upon the shealings, and to keep them off while the hunting lasts, is legal, or can or ought to be enforced? 3. Such obligation, if binding, is contrary to and made null by the act Geo. I. c. 54, which abolished personal services of this nature. 4. The question must now be judged of without regard to the respondent's concessions, or the modifications of the Court below. 5. Besides, the obligation is against the common law, and such as courts of law cannot and ought not to enforce. It amounts to this, that a large tract of country shall be laid waste and diverted from all useful purposes at the pleasure of the respondent, perhaps half a dozen times in the year—a hardship to which the appellant ought not to be subjected.

Pleaded for the Respondent.—1. The right of hunting over the grounds in question is ascertained to belong to the respondent, by the solemn conventional agreements alluded to. The contract 1716 and decree arbitral 1761, in which the property of the grounds in question is declared to belong to the respondent; and the limited right of servitude of pasturage confirmed to the appellant, expressly declare that this servitude shall, among other things, be burdened with the respondent's right of hunting; and these deeds, so explicit, and remaining in full force and effect, foreclose all question on the subject. 2. The statute alluded to has no bearing upon the question, having reference to the assembling of the clans in the Highlands. 3. The respondent's concessions to the appellant have been ill requited, by the present vexatious and frivolous appeal.

After hearing counsel,

The LORD CHANCELLOR LOUGHBOROUGH said,

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“ My Lords,

“ This case, on the part of the appellant, appears to me to be the most frivolous and litigious that I recollect to have seen in this House ; though I am sorry to say that your Lordships have had occasion to determine upon several litigious appeals, in the course of the last and of the present Session of Parliament.

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“ The object of the present appeal is sufficiently obvious, though it is by no means what the printed papers profess it to be. The facts are these :—The appellant’s family, for a long tract of time, have enjoyed a grant or right of pasturage over lands, the property of the respondent’s family. This right has been acknowledged on the part of the respondent’s family ; but subject, as is declared by a contract entered into between the parties in 1716, to a right of hunting on the part of the latter. By this contract, it is clearly ascertained that the family of Lude had merely a *servitude* of pasturage ; they thereby disclaimed the right of property. It would be a contradiction in terms to say that a person had a right of servitude upon his own lands.

“ For some time after the date of this contract, no dispute took place with regard to the right of hunting ; in fact it was not exercised ; and, from non-usage, a question was raised of the existence of it. A reference was thereupon entered into, to Mr. Mackenzie of Delvin, a gentleman of great note and eminence in the profession of the law, and well acquainted with the matter in dispute, being the neighbour of both parties. He made an award, confirming the contract 1716, and settling several particulars, which by it were left loose and undefined ; and then again the matter for a considerable time rested.

“ Though totally inapplicable to the present cause, the appellant has made a statement, that the property of the lands over which, by the contract 1716, the servitude of pasturage is declared, belonged anciently to his family, but had been wrested from them by the tyranny of the respondent’s family. He has gravely introduced into the cause a story, that, after the rebellion 1715, a brother of the then proprietor of Lude had been committed for treason to the custody of the then Duke of Atholl, and that the Duke had, by coercion, on account of this person, compelled Mr. Robertson of Lude to enter into the contract 1716. But of this not a shadow of evidence was attempted to be brought.

“ Previous to the commencement of the proceedings which gave rise to this cause, various contraventions are stated to have been committed by the appellant, such as keeping swine, and shooting upon the premises. In point of fact, there were contraventions of the contract, but it was said that the guns were kept to kill foxes. At last the respondent gives notice to the appellant that he meant to hunt upon the shealings, and desires him to make

1798. *the grounds clear for that purpose, in compliance with the award. To this the appellant gave a direct refusal, and a disclaimer of the award.*
 ROBERTSON *" The appellant, therefore, applied to the Court of Session for an*
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 DUKE OF *interdict to prevent the enforcing of the award, which he obtained,*
 ATHOLL. *and this measure was acquiesced in by the respondent, and so that*
step of proceeding fell to the ground.

" The respondent afterwards gave the appellant a charge to fulfil the decret arbitral, a mode of proceeding which, though unknown in this country, has been long established in the courts of law in Scotland. In the case of intermixed or clashing rights between different parties, the Court of Session will interfere to declare and define their several rights, which the courts of law here would not do, but would wait till an action for trespass were brought by some of the parties.

1 Geo. I. c.
54.

" To this charge Mr. Robertson took a most frivolous, and indeed ridiculous defence ;—namely, that by an act of Parliament for the public policy of the kingdom, made to prevent the gathering of large bodies of people together, to the number of three or four hundred, for hunting and other purposes, which had been found very dangerous to the national safety, the right of hunting claimed by the Duke was abolished. This is totally different from the rights thereby abolished, for which satisfaction was directed to be given to the proprietors of them, under the inspection of the Court of Session. Is it possible seriously to maintain that any common exercise of this right of hunting, on the part of the Duke, without calling out the country, can be deemed to be contrary to this act of Parliament ?

" It was further argued by the appellant, that this right might be exercised invidiously. This could only have been in two ways, by giving vexatious notices to clear the ground, which were not acted upon, or by continuing upon the ground for a length of time that would be destructive of the right of pasturage. In both these cases I have no doubt the appellant would have had a good ground of action ; and, in the last of them, to support this defence, it must be further supposed that the Duke would persevere in this laborious exercise on the same spot for the great part of the summer.

" But, to do away all objection on these heads, the counsel for the respondent reduced his right of hunting to as small a scale as it could be supposed to exist on :—and, in consequence of such restriction, the Court pronounced the interlocutors appealed from.

" Though it be obviously contrary to the terms of the contract and award, and indeed a manifest contradiction in terms, the appellant has still distinctly stated to your Lordships, that the property of the premises is in him. All that the Court has done appears to me to be completely favourable to the appellant ; the right of hunting was fixed by the decree in a manner so as hardly to be felt by him. I am at a loss, therefore, to conceive what could have induced him to challenge it ; but it seems to be of a piece with the most unwarrantable charge that he has brought against the Atholl family ;

or devised for the purpose of obscuring the right of property in the premises, if the decrees should be reversed. 1798.

"I therefore submit that the appellant, by his vexatious conduct, has called upon your Lordships that some costs should be given against him, to mark your opinion of it. If the situation of the parties had been different, it would have been proper to go a greater length; but, as it is, I must move that the decree be affirmed, and that the appellant do pay to the respondent the sum of £100 for his costs." KYDE v. DAVIDSON, &c.

It was accordingly

Ordered and adjudged that the appeal be dismissed, and that the interlocutors be affirmed, with £100 costs.

For the Appellant, *Sir John Scott, W. Grant.*

For the Respondent, *Wm. Adam, Wm. Tait.*

(M. 5597.)

MAJOR ALEXANDER KYDE, in the East India Company's Service,	} <i>Appellant;</i>
JOHN DAVIDSON, Trustee of Mrs. LINDSEY, Heiress at Law of Colonel Kyde, &c.,	
	} <i>Respondents.</i>

House of Lords, 16th May 1798.

WILL—HERITABLE BONDS—HERITABLE OR MOVEABLE.—An officer in India, and in the East India Company's service, remitted home to his attorneys in England, two sums of £2500 and £3000, with instructions to lay out the same in landed security. This was done accordingly, and the bonds taken in their name in trust for him. Sometime afterwards, he, being then still in India, made a will appointing trustees, and, after leaving several legacies, bequeathed the residue to the appellant. Mrs. Lindsey, as his heiress at law, having claimed the heritable bonds, which no will could carry. Held her entitled to these.

Colonel Kyde being in India, in the East India Co.'s service, remitted certain sums of money to his attorneys in Great Britain, with instructions to lay out the same in *land security*. In June 1780 £2500 of this money was, in terms of his instructions, invested in heritable security over estates in Forfar, Scotland, the rights being conceived in favour of the attorneys, *in trust for behoof of Colonel Kyde*. In 1786 the attorneys laid out £3000 more on an assignation to an heritable security and debt over the same estate.

In 1793 Colonel Kyde, still in India, made his *will*, ap-

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 DAVIDSON, &c. pointing several gentlemen in England his trustees, and after leaving several legacies, particularly £500 to the respondent, Mrs. Lindsey, his heiress at law, he bequeathed "the remainder of his fortune, including his house and garden at Subpore, and all his monies and effects whatsoever in Europe and in India, to (the appellant) Major Alexander Kyde."

Under this will the appellant, after the Colonel's death, claimed the two heritable bonds above mentioned. This being disputed by the heiress at law, mutual actions were raised to try the question. For the respondent, the heiress at law, it was maintained that heritable estate in Scotland could not be disposed of by will, to the prejudice of the heir at law; and the bonds being heritable, and not properly disposed of by the deceased, descended to her as the Colonel's heiress at law. For the appellant, it was maintained that the trustees appointed to hold the money, although they were instructed to invest it in heritable security, yet were only to hold it in trust for the behoof of Colonel Kyde, and to be paid to him when demanded. Accordingly, the money was invested in their names as trustees, in trust for his behoof.

The Lord Ordinary preferred Major Kyde to the heritable bonds; but, on reclaiming petition, the Court altered, Mar. 11, 1797. and found "that the money in question being settled on Dec. 20, — heritable security in Scotland, with the approbation of Colonel Kyde, cannot pass by will, but falls to be taken up by the heir at law; and remit to the Lord Ordinary to proceed accordingly." The Lord Ordinary afterwards decerned in terms thereof. Jan. 3, 1798.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The reason given by the Court is, that the money in question being settled upon heritable securities in Scotland, with the approbation of Colonel Kyde, cannot pass by will, but falls to be taken by the heir at law. The appellant conceives that the very opposite conclusion ought to have been arrived at; for supposing it true that Colonel Kyde knew and approved of the money being lent on heritable security in Scotland, it must also be admitted that he also knew that these securities were not taken payable to himself. *He* had no heritable right in them. He could not have sued upon them. The bonds were taken in the name of other parties; and all the right

which he had was a right to call these parties attorneys, to account for and pay to him the sums therein: The heritable securities, therefore, being held by these parties in trust for Colonel Kyde, the claim of the heir at law, as such, was completely barred, leaving the sums therein to which he was entitled, to be carried by the Colonel's will as a part of his other funds.

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Pleaded for the Respondents.—The late Colonel Kyde was not ignorant of the consequences of his dying without making a regular disposition of the heritable securities in question. He was a native of Scotland; he had directed his money to be laid out in land security, which was done accordingly, under his own orders, and with his approval. The consequence of all these steps, and his ignorance of those consequences, are not to be presumed. Money secured upon land, as this was, is to all intents and purposes the same as land. It is real estate, and heritable in every sense. The appellant admits, that if the securities had been taken to Colonel Kyde himself, they would not have passed by the will, and must have gone to the heir at law. But in effect it makes no difference, as the right in the attorneys was merely nominal, the real and substantial right being in Colonel Kyde. But the true test to try this question is, to inquire to whom the trustees were bound to pay on the Colonel's death;—Whether to the heir at law, or to the executor of his will? And it is clear in this view, that the only party who could demand payment from the trustees, was the heir at law after service. It was not therefore a personal right in the Colonel merely to call the trustees to account. Had the trustees received the money in Colonel Kyde's lifetime, it would have been personal; but as the money remained heritable, it must be presumed that the deceased wished it to be so.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *W. Adam, Cha. Thomson, T. W. Baird.*

For the Respondents, *Sir J. Scott, T. Erskine, W. Grant,
W. Tait.*

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(M. 4478.)

DRUMMOND, &c. v. DRUMMOND, &c.	Mrs. SARAH DRUMMOND, Widow of the deceased JAMES DRUMMOND, Esq., of Deptford, Guardian for her Son, and WILLIAM MOLLE, W.S., her Attorney, . . .	}	Appellants ;
	JAMES DRUMMOND of STAGAITH, Esq., and Others, Trustees of Mrs. CLOW or DRUMMOND, Wife of the deceased JAMES DRUMMOND, and Others, being the Mother and four surviving Sisters of the late DAVID DRUMMOND, . . .	}	Respondents.

House of Lords, 20th Feb. 1799.

HERITABLE DEBT—RELIEF AMONG HEIRS—FOREIGN DECREE—DOMICILE—RES JUDICATA.—A party, originally a native of Scotland, died domiciled in England, leaving an heritable estate in Scotland, and considerable moveable estate in England. The deceased's brother succeeded to the heritable estate in Scotland, and his mother and sisters, along with himself, to the personal estate in England. There was an heritable debt over the estate in Scotland for £2000, to pay which he sold part of the estate. He also took out letters of administration as to the personal estate in England; and the respondents having brought action there to make him account for their shares, he contended, that as by the law of England, where the deceased died domiciled, heritable bonds were a charge on the personal estate, he was entitled to deduct the heritable debt paid. The courts in England found accordingly. But the respondents thereafter raised an action in Scotland, of relief against the heir of provision in the heritable estate. Held him liable in relief, and that the foreign decree was neither *res judicata*, nor had decided the question of relief competent to the executors against the heir, who, according to the law of heritable estate and succession in Scotland, was liable to pay that debt.

Mr. Clow, Professor of Logic in the University of Glasgow, left his estates of Duchally and Pettentian, situated in the county of Perth, in Scotland, to his nephew, "David Drummond, merchant in London, and the heirs of his body, whom failing, to James Drummond, and the heirs of his body."

David Drummond succeeded to these estates. He was a native of Scotland, but had been always domiciled in Eng-

land, engaged in business as a wine merchant. He had, after his succeeding to these Scotch estates, resorted occasionally to Scotland, and resided at the mansion-house, which was furnished, and where he had an establishment of servants, but his permanent domicile was in England.

He granted an heritable bond over both these estates of Duchally and Pettentian to Captain Birrel of Kirkaldy, for the sum of £2000 borrowed from him. He died thereafter in London, intestate, and without issue, leaving considerable moveable estate, and the real estates above mentioned.

In terms of his uncle's deed, the heritable estates in Scotland devolved on his brother, James Drummond, as heir of provision. The personal estate, if regulated according to the law of England, devolved on his mother, his five sisters, and James Drummond his only brother, the heir to the heritable estate.

James Drummond took out letters of administration from the Prerogative Court of Canterbury to the personal estate. He also made up titles to the Scotch estates, and sold the estate of Duchally for £3800; and from the price thereof paid off many of his brother's debts, and in particular, the bond of £2000 to Captain Birrell.

The respondents, as next of kin, preferred their claim against the administrator in England, by raising an action in the English Courts to make him account for the personal estate, and to have the same distributed according to the English statute thereon. Accordingly, the administrator was ordered to give in, and did give in, an inventory of the personal estate, but having deducted from the amount thereof the sum of £2000 paid to Captain Birrell, being the amount of the deceased's bond to him, the question came to be, Whether this debt was a charge on the real estates in Scotland, or his personal estate in England?

The next of kin contended, before the English Courts, that the deceased was a native of Scotland. That at the time of his decease, and for several years before that event, he was possessed of real estates in that country, constantly kept an establishment of servants at his mansion-house of Duchally, and occasionally resided there. That, though by the law of England, mortgages when paid, are chargeable against the personal estate, and so fall on the executors, yet the bond here was not an English bond. That this was a Scotch bond for money to be paid in Scotland, to a party domiciled in Scotland, and secured over estates there; that,

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therefore, it fell to be regulated by the law of Scotland. which made such heritable burdens chargeable on the real estates, and consequently on the heir who took the Scotch estates so burdened. The estates having been burdened with the debt, the heir who takes these estates is both primarily and ultimately liable for the amount. In answer, it was admitted by the administrator that he had paid the £2000 bond out of the price of the Duchally estate sold; but as the deceased died domiciled in England, his personal estate was to be administered according to the English law; and as that law rendered the personal estate primarily liable for the debts due by mortgage or heritable bond, he was entitled to take credit therefor from the personal estate. The Court of England held, that "this was completely an *English* transaction. The deceased was an Englishman, and "the administrator an Englishman." "The payment was "made as administrator, and he had a right to make it."

No appeal was taken from this sentence, but the respondents, conceiving that the above judgment did not bar their claim of relief against the heir of provision, who was primarily liable as such for the payment of this heritable debt, raised the present action in the Court of Session against him, concluding for relief, and payment of six-seventh parts of the £2000 (James Drummond being entitled to the other one-seventh according to the law of England).

At first, the Lord Ordinary (Lord Justice Clerk M'Queen) pronounced this interlocutor: "In respect that David
 Feb. 1, 1797. "Drummond died domiciled in England, and that letters of
 "administration were taken out from the Prerogative Court
 "of Canterbury by the defender, James Drummond, finds
 "that the personal estate of the said David Drummond is
 "to be administered according to the law of England; and,
 "in respect that this question has been already tried, and
 "received the decision of the Judge of the Prerogative
 "Court, finds the action not now competent in this Court,
 "and therefore sustains the defences."

But afterwards, on representation, his Lordship found,
 Dec. 8, 1797. "that by the laws of Scotland, when a sum of money is se-
 "cured upon lands by an heritable bond and infestment,
 "the lands are held to be the principal debtor; and in
 "respect that the estate belonging to David Drummond,
 "over which the heritable bond in question is granted, was
 "taken up by James Drummond as heir to his brother: and
 "that the same is of much greater value than the sum in

" the heritable bond ; finds, that James Drummond is ultimately liable for payment of that heritable bond without relief against the personal estate of David Drummond : Finds, that the decree of the Prerogative Court of Canterbury went no farther than to find that the sum in the heritable bond, being chargeable as a debt against the personal estate, so James Drummond, who paid the heritable bond, was entitled to take credit for the contents thereof in accounting for the personal estate, but did not determine the question of relief competent to the executors against the heir. Therefore, alters the former interlocutor, repels the plea of *res judicata* ; finds, that James Drummond, the heir, is liable to the pursuers in payment of the contents of that heritable bond, and decerns."

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&c.

On reclaiming petition, the Court adhered. " In respect, May 17, 1798. the pursuers did insist only upon a decree for six-seventh parts of the sum in the heritable bond." A second reclaiming petition was presented, contending that the Prerogative Court had already pronounced decree in this matter, which fell properly within its cognizance, and was exhaustive of the present question, and that, as the deceased was a domiciled Englishman, the succession to his personal estate, and the burdens to which that estate was liable, behooved to be regulated by the law of England, and consequently, that the decree of the competent Court in that country must be held to be *res judicata* in favour of the defenders. But the Court adhered with expenses. May 30, 1798.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The deceased David Drummond, though a native of Scotland, was domiciled in England at the time of his death, and having died intestate, the succession to his personal estate must be regulated by the law of England ; and those who are called to the succession, by that law must take it with every debt and with every burden to which that law has rendered it liable. By the law of England, the mortgaged debt due to Captain Birrell having been contracted by the late David Drummond himself, is chargeable on his personal estate, (which is more than sufficient for answering the same), in exoneration of the real estate. This heritable debt due to Captain Birrell having been completely extinguished by the discharge and renunciation of the creditor, the heritable security was at an end, and the real lien over the lands was dissolved, and

1799. the executors had nothing more than a personal claim of relief against the heir. This claim of relief was cognizable in the Prerogative Court of Canterbury, which, as it is undoubtedly competent to take cognizance of the accounts of the administrator acting under its own authority, and to compel from him the account and final distribution at the instance of the next of kin according to their rights, so it had also an undoubted jurisdiction to take cognizance of every question necessarily incidental to such accounting and distribution; and, *de facto*, the judgment of the Prerogative Court of Canterbury, admitting the articles in the account objected to in the allegation for the respondents, was decisive as to that very claim of relief which they endeavour to make effectual by the action in the Court of Session. The point in dispute between the parties having therefore been determined by the sentence of a Court of competent jurisdiction, that sentence was to be considered as affording to the appellants the *exceptio rei judicatæ*; and, consequently, it was not competent for the respondents to insist in the action before the Court of Session, in order to make effectual that claim. And even although such action had been competent in the Court of Session, and although the judgment of the Prerogative Court of Canterbury had not stood in the way, still, as the real lien over the estate in Scotland was dissolved by the discharge and renunciation executed by the creditor, the action in the Court of Session could have been nothing more than a personal claim of relief, in which the pursuers ought to have insisted as the nearest of kin of their deceased brother, and, as such, having right to a share of his estate by the law of England; and, consequently, every personal claim competent to them *qua* nearest of kin, must have been decided by the law of England, which was the domicile of David Drummond; and as by the laws of that country the personal estate was the primary fund for the payment of any debt contracted by David Drummond, so his nearest of kin must take his succession according to that law, and cannot, by resorting to the Courts of a foreign country, compel a distribution different from that which the law of the domicile authorizes.

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 ———
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Pleaded for the Respondents.—By the law of Scotland, when a sum of money is secured by an heritable bond and infestment, the land is held to be the principal debtor, and the land passes to the heir, burdened with the heritable debt, as much as with the land tax, or any other imposition

which the public law of the country lays upon it. When, therefore, James Drummond, who vested himself in the right of these lands, sold part of them, and out of the price discharged the debt due to Captain Birrel, he was only relieving himself of an incumbrance of which, had it been discharged at the expense of the executry, he himself would have been ultimately liable in the relief. But, as the debt was not paid out of the personal funds, nor is there any deficiency in the real estate, but, on the contrary, a very considerable reversion, there are no grounds for throwing this burden upon the executry in ease of the heritable property. This being a question in regard to an heritable subject situated in Scotland, the law of that country must be the rule according to which it is to be judged of. Though, by David Drummond having died domiciled in England, the personal succession must be governed by the law of that country, yet that cannot affect or interfere with the succession to his real estate situated in a different country, and governed by a different law;—land, which cannot, like moveable property, be removed from one country to another at the pleasure of the proprietor, must necessarily be subject to the rules of the jurisdiction within which it is situated; and as it can only be acquired and transferred according to the forms, and under the qualifications which the law of the jurisdiction points out, so it must be subject to all those burdens and limitations which the law imposes. Accordingly, James Drummond, when he took up these estates of Pettentian and Duchally, by a service as heir of provision, took them with the burden of Captain Birrel's infestment; and as he became possessed of the fund out of which Captain Birrel was entitled to operate payment of his debt, so he was primarily and ultimately liable for the discharge of it, without recourse against any person whatever. By serving himself heir in a subject situated in a country in which the law imposes the payment of heritable debts upon the heir, James Drummond became as effectually bound to discharge the sum in question, without relief against the executry, as if he had entered into a contract for that purpose, both with the creditor and the other next of kin; and under that condition only he takes up the succession. And there is here no *res judicata* that can render it incompetent for the Court of Session to judge in a question which naturally and properly falls under their jurisdiction alone. The decision of the prerogative Court of Canterbury respected only the accounts of the administrator,

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in his management of the personal funds; and in allowing him to state the contents of this heritable debt as part of this account, it went no further than to determine, that as a debt chargeable against the personal estate, he was entitled to take credit for it in accounting for that estate. The action brought against the administrator in the Prerogative Court, related solely to the personal funds; and according to the terms of the record, the accounts exhibited were of his management as administrator only, and from the limited nature of its own jurisdiction, and the proper *forum* for determining the question of ultimate relief, being the law of the place where the landed property lay, not the law of the place where the deceased died domiciled, the Court could not have intended to preclude the after discussion of the matter, neither could its judgment have that effect.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *W. Adam, John Bell.*

For Respondents, *W. Grant, F. Lawrence.*

(M. 16787.)

MRS ROSE ANDERSON, Wife of THOMAS HAY	} <i>Appellant ;</i>
MARSHALL, Merchant in Perth,	
THOMAS HAY MARSHALL,	- - - <i>Respondent.</i>

House of Lords, 8th April 1799.

DIVORCE—PROOF—ADMISSIBILITY OF THE SOCII CRIMINIS AS WITNESSES.—In an action of divorce for adultery, brought by the husband against his wife, she was charged in the libel with having committed adultery with two persons therein named. In the proof led, meetings with these parties at night, in suspicious circumstances, were proved, but no direct proof of adultery. The defender, on her part, sought to adduce the alleged paramours as witnesses in her favour. The Commissaries having considered the nature of the proof led, held them inadmissible; and this, in an advocacy, was adhered to by the Court of Session. On appeal, reversed; and held, that the *socii criminis* were equally competent as witnesses for the defender, as when adduced as witnesses for the pursuer, in an action of divorce for adultery.

The respondent raised an action of divorce against his

wife, the appellant, for acts of adultery said to have been committed with the Earl of Elgin and Dr. Harrison. A proof was allowed; but no direct or positive act of adultery was proved, although meetings at night, in suspicious circumstances, were proved. The parties were seen at night leaning against a gate, with their bodies close together, and when they separated in alarm, her dress was a little disturbed. They were also seen together in a stair case; and letters addressed by her to the parties, vowing love, and appointing meetings, were also proved. The appellant, after the conclusion of the respondent's proof, offered to adduce the Earl of Elgin and Dr. Harrison as witnesses in her favour. To this it was objected before the Commissaries, that these witnesses, being *socii criminis*, were materially interested in the cause, and consequently inadmissible.

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The Commissaries held, "In respect of the proof adduc- Mar. 23, 1797.
"ed, sustain the objection, and find the Earl of Elgin and
"Dr. Harrison inadmissible as witnesses for the defendant
"in this cause." The Commissaries having refused a peti-
tion against this interlocutor, the case was brought before
the Court of Session by advocacy, which being reported to
the whole Lords, the Lord Ordinary thereafter pronounced
this interlocutor: "Having advised with the Lords, refuses Feb. 6, 1798.
"the bill, and remits to the Commissaries, with this in-
"struction, that they sustain the objection to the admissibi-
"lity of the Earl of Elgin and Dr. Harrison.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The objection stated by the respondent to the admissibility of these witnesses on behalf of the appellant is, that they are *socii criminis*. But this assumes what has not been proved,—namely, that they are actually guilty as such. In other words, that they have been guilty of adultery with her. Nothing of this has been directly proved; and the whole objection therefore rests upon the bare averment of the pursuer in his libel, that the appellant (defender) has been guilty of adultery with these parties. If this were sufficient to debar her from their testimony as *socii criminis*, a pursuer might deprive a defender of the evidence of every man who could bear testimony to any circumstance in her favour, by placing him in the list of her alleged paramours. But even if the bare averment of the respondent (pursuer) could have the effect of placing these witnesses in the eye of law in the light of *socii crimi-*

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nis, yet the objection would not stand good ; because there is nothing in the law and practice of Scotland to show that the alleged *socius criminis* is an incompetent witness. The charge of guilt against a witness lays him under no restraint, because he cannot be compelled to swear. And though, with this power of declining, he should choose (being really guilty) to come forward and criminate himself, his evidence could not affect him in any action of damages that might be brought against him at the husband's instance. He is therefore under less temptation to swear falsely than a witness who is liable to be compelled to swear. It is a settled point, not now, after the decisions, to be doubted, that the alleged *socius criminis* is a competent witness when adduced by the pursuer, and there ought therefore to be no difference whether he is adduced by the pursuer or the defender. But even supposing, in the general case, that the *socius criminis* was an incompetent witness for the defender in an action of divorce, on the head of adultery, the principle would not apply to a case like the present. Here the fortune, fame, and happiness of the defender, are involved in this criminal charge. Law and justice require that she should be entitled to prove every fact tending to clear and exculpate her from her guilt ; and when this can only be effected by the testimony of a witness, or witnesses, to whom legal objection otherwise applies, law allows them to be examined, leaving it to the judge to attach such credibility as may be due to the evidence.

Pleaded for the Respondent.—There is no necessity to resort to the evidence of the alleged *particeps criminis*, in order to exculpate the appellant from the charge, even if competent, as, before she can enter on her exculpatory evidence, the pursuer's proof must first be completed. And the object of now examining these witnesses can only be to get them to swear in her favour, and thus contradict the pursuer's proof so far as led—a proof which, without that contradiction, is of the strongest possible nature, and goes to criminate the parties she wishes to adduce. The respondent maintains that the witnesses adduced in these circumstances are incompetent ; and if adduced, that no possible credit could be given to their evidence. If they were to confess her guilt, they would publish their own infamy, and involve them in damages. Every bias of interest—every regard for their own reputation, necessarily inclines them to clear themselves of the charge imputed to them, and, in doing so, to clear the cha-

acter of the appellant. If they confessed, their evidence would be sufficient to convict them of damages. They might, it is true, refuse to swear ; but, it is presumed, that as they are called, so they intend to depone ; and where there is so strong a bias existing to perjure themselves, to save their own character as well as patrimonial interests, the witnesses ought to be rejected for the appellant, on the ground that they are *socii criminis*.

After hearing counsel,

THE LORD CHANCELLOR (LOUGHBOROUGH) said,

“ MY LORDS,

“ The question at issue by the present appeal is a very short one ; and its merits lie in a narrow compass.

“ The respondent brought an action of divorce against the appellant, his wife, for adultery, before the Commissaries, the proper ecclesiastical Court in Scotland : and he charged her as having been guilty with certain persons, whom he specially mentioned. The practice in this Court in former times, and till it was corrected by your Lordships, was of a singular nature. The mode was, in similar cases, that the husband charged his wife in general terms “ with adultery committed with divers persons, at divers times, and in divers places.” In a case which came before the House by appeal, in which I was concerned as one of the counsel, a defender claimed as her right, that the crime should be stated more particularly, before she entered upon her defence, which was accordingly ordered by your Lordships.* The pursuer in the present action, agreeably to modern practice, charged the acts of adultery as committed with the Earl of Elgin, and a Mr. Harrison.

“ In the course of the action the parties proceeded to a proof ; and the depositions of the witnesses, on the part of the pursuer, were taken and published before the defender was enabled to bring her exculpatory evidence. In that stage of the process, the appellant, in her defence, offered to call the two persons with whom she was accused, to disprove the evidence given for the husband. If they had been examined, questions might have been put to them which they might have declined to answer ; but to others they would not have had a right to demur. The Commissaries, however, held them to be incompetent witnesses ; and the cause having come before the Court of Session by review, they sustained the objections to the admissibility of these witnesses.

“ It is true that the proof which was taken and published, entered much into the consideration of the Court of Session, in judging of the point of admissibility. Some of the judges go the length to

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* The case here referred to the Compiler has not been able to find.

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hold the opinion, that the pursuer had made out his case. But such a conclusion seems to be too large, and by no means warranted by the premises, and, in my opinion, would be of dangerous consequence, because it would go to establish this, that the circumstances of suspicion sworn to were not to be redargued, or answered by the persons most capable of clearing them up.

“ The case, on the part of the respondent, was well argued as to the strictness of the ancient law of Scotland in matters of evidence. I confess that I feel some degree of difficulty and hesitation in giving an opinion upon this question. In any proceedings that could be held in the courts of this country, there is no doubt but that Lord Elgin and Mr. Harrison would be admissible as witnesses. I have therefore to fear my being liable to a bias, in adopting those rules of law which have the greatest hold of my affections, and of my understanding.

“ But I am the less alarmed on the present occasion, as the history of the laws of every country shows us that the rules of evidence have gradually relaxed in strictness. Anciently, in this country, they were much more narrow than they are at present, and, in my time, I have seen many relaxations ; and objections formerly sustained to the admissibility of witnesses would now be disallowed. In England a more liberal practice in the admissibility of witnesses obtains than in any other part of the world, because here witnesses are examined in public.

“ In Scotland, they have also got rid of many objections to the admissibility of witnesses which are to be found in their text writers ; but some of them still exist.—It is totally unnecessary for me to enter into a detail of those objections ; I shall confine myself to the point at issue in the present case, and inquire whether the law of that country be not consistent with itself in collateral points.

Feb. 18, 1771. and which came before your Lordships by appeal, the case of *Nichol-
 Vide ante App.* son Stewart against his wife, it was decided, that the husband might
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adduce the alleged adulterer as a witness against the wife. And surely, on every ground of analogy, of reason, and of substantial justice, this rule must hold *e converso*; and the party accused be allowed to repel the alleged criminality by similar evidence.

“ I think the practice of the Court of Session, in the present case, exceedingly inaccurate, where it is held, that the proof already adduced was of such a nature as not to admit them to listen to other evidence to redargue it. Finding that the Court had entered at large into a consideration of this proof, I have read it with attention, and I must take the opportunity here of observing, that I think it would be extremely becoming in the Court of Session to correct the present mode of taking proof. Such a heap of trumpery and trash, as appears in the present case, I have never met with on any occasion.

“ Nor does it, taken either collectively or otherwise, in my opin-

ion, lead to any conclusion that should raise a doubt as to the propriety of examining the persons proposed by the appellant in her exculpation. If such a proof were offered at your Lordships' bar on a divorce bill, an act certainly could not be obtained in consequence of it. Nor do I think that a case so slightly supported was ever sent to the consideration of a jury in an action of damages.

"I have little difficulty, therefore, though against the judgment given by the Court of Session, which I conceive to be contrary to the general principles of law and of reason, to move that your Lordships should reverse the judgment appealed from, and declare that the Earl of Elgin and Mr. Harrison are admissible witnesses on the part of the appellant."

Accordingly, it was

Ordered and adjudged that the several interlocutors of the Commissaries of Edinburgh, and of the Lords of Session, complained of in the amended appeal, be, and the same are hereby reversed;—and it is further ordered, That the cause be remitted back to the said Commissaries, with instructions to repel the objection to the admissibility of the Earl of Elgin and Dr. Harrison, as witnesses on the part of the defender in the said cause.

For Appellant, *T. Erskine, W. Grant, Henry Erskine.*

For Respondent, *Sir John Scott, Wm. Adam.*

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HERIOT
v.
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GEORGE HERIOT, calling himself the lawful
Son of GEORGE HERIOT, deceased, who
was the second Son of ROBERT HERIOT
of Ramornie, Esq., } *Appellant;*

HON. MARGARET MAITLAND MAKGILL, Wi-
dow, and JAMES MAITLAND MAKGILL her
second Son, otherwise JAMES HERIOT of
Ramornie, Esq., } *Respondents.*

House of Lords, 29th April 1799.

REDUCTION OF SERVICE ON THE HEAD OF ILLEGITIMACY—MAR-
RIAGE—CONSTITUTION.—A party alleging himself to be the law-
ful son of George Heriot, second son of Robert Heriot of Ramor-
nie, served himself heir to his deceased father before the bailies of
Canongate. In the reduction of this service on the head of ille-
gitimacy: Held, that the appellant had failed to adduce sufficient
proof that his mother was lawfully married to his reputed father,

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either by celebration by a clergyman, or by cohabitation as man and wife, or by general repute.

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The present question of legitimacy and constitution of marriage, arose incidentally in the course of the appellant taking out brieves to serve himself the lawful son and heir of George Heriot, second son of the deceased Robert Heriot of Ramornie, and as such, entitled to succeed to the estates of Ramornie.

Robert Heriot, Esq. of Ramornie, died in 1751, leaving four sons, William, George, Robert, and James, and four daughters, Jane, Elizabeth, Janet, and Margaret.

William entered the military service of Holland, and, after attaining the rank of Captain, died in 1782, without issue.

George, the alleged father of the appellant, was an ensign in the army, and died in Ireland, but at what time the appellant could not specify. Robert was a doctor in the East India Company's Service, and, after succeeding to the estates of Ramornie, upon the death of his brother William, died in 1789, without ever being married.

James died young; and Jane succeeded to the estates of Ramornie after the death of her brother Robert, and died in 1791. None of the daughters were ever married except Janet, and she left no issue. The respondents succeeded to Ramornie after the death of Jane, Mrs. Maitland Makgill, as one of the heirs portioners of Dr. Robert Heriot, as well as heir of tailzie and provision under the entail 1665; while James Heriot was heir of entail of the deceased William Heriot, under the deed 1771.

This latter deed conveyed the estate, 1. To his brother Robert; and, failing him, 2. To his sisters *seriatim*, whom failing, to the respondent James Maitland Makgill, otherwise Heriot.

After a proof was led in the service for both parties, and the terms circumduced, the inquest signified a desire to have further proof. A second proof was taken, and the term again circumduced on 9th March 1792, whereupon the jury found a verdict in favour of the claimant by the casting

July 8, 1792. voice of the chancellor or foreman.

The respondents then brought the present action of reduction to set aside the service. A proof was ordered, and the Court, after fully hearing counsel thereon, pronounced an
July 5, 1793. interlocutor, sustaining the reasons of reduction, and reducing the verdict.

The appellant having reclaimed, and, besides insisting on the evidence formerly adduced, made sundry new allega-

tions in fact which he offered to prove. The Court, though it was objected to, allowed the proof, upon which many additional witnesses were examined, and, in particular, William Turner, a relative of the appellant's mother, Margaret Turner, they altered their former interlocutor, and repelled the reasons of reduction, and assoilzied the defender.

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The respondents, on their part, reclaimed; and having obtained time from the Court, they, at this period, discovered that John Lumsdaine of Blancern, Esq., was in the knowledge of some particulars extremely material to the question at issue, of which they had not before received information, and they therefore presented an additional petition to the Court, praying that Mr. Lumsdaine might be examined, which the Court granted; and, upon a petition from the appellant, the Court also allowed Mrs. Swan to be examined.

The point to which the whole evidence was made to direct itself was, whether Ensign George Heriot, the appellant's reputed father, and Margaret Turner his mother, were married in the year 1747, or about that period, in Edinburgh?

It appeared that he had formed a connection with Margaret Turner in 1748, the result of which was, the birth of the appellant. The appellant, in the outset of his case, represented his mother as a woman of family, of great beauty, of elegant accomplishments, and a pattern of virtue. It afterwards came out, however, that she was the daughter of William Turner, a publican at Irvine. He also alleged, that the marriage of his mother to Ensign Heriot was celebrated by a clergyman in Edinburgh, but adduced no certificate, and no parole evidence of persons who witnessed the ceremony. He also alleged marriage by cohabitation. In the additional evidence adduced, Mr. Lumsdaine deponed, "That about the year 1746, he knew a woman whose maiden name was said to be Peggy Turner, but she was commonly known by the name of Peggy Bar; and the deponent understood that she came originally from Glasgow, or its neighbourhood, and that she had been married there to a man of the name of Bar, but whether he was dead at the time the deponent knew her, or if she had left him, the deponent does not recollect having heard; and when the deponent first knew her, she was reported to be in keeping by Peter Brown, writer in Edinburgh; and the deponent saw the said Peggy Turner for the most part at the house of Mrs. Menzies, who lived in a close leading from the Cowgate to the Society; and the deponent has

' 1793. " seen the said Peter Brown along with Peggy Turner at
 ————— " Mrs. Menzies'. That the deponent knew Ensign Heriot,
 HERRIOT " whose name the deponent believes was George, and he
 v. " became acquainted with him about eight or nine months
 MARGILL, &c. " after he first knew Peggy Turner; and has seen said
 " Ensign Heriot at Mrs. Menzies' in company with the said
 " Peggy Turner and other women; and Mrs. Menzies' house
 " was not a house of bad fame, but she herself was in keep-
 " ing at the 'time by a Mr. David Wright. And being in-
 " terrogated, If he considered Peggy Turner to be a virtu-
 " ous woman? Depones, That he considers this as already
 " answered by that part of the deposition, which states that
 " she was kept by Peter Brown. And being interrogated,
 " If, when the deponent saw the said Peggy Turner in
 " Mrs. Menzies', along with Mr. Brown or Ensign Heriot,
 " she behaved as a married woman would do in the pre-
 " sence of her husband? depones, That he never, on any
 " occasion, saw her behave indecently or improperly; that,
 " upon none of these occasions, when he saw the said Peggy
 " Turner or Bar, did he ever hear her called or addressed
 " by the name of Mrs. Heriot, either by Ensign Heriot or
 " by any other person."

Ensign Heriot, in December 1748, left Edinburgh to join his regiment in Ireland; and some months afterwards Margaret Turner was delivered of the appellant; and about a year after he left she followed him to Ireland (Cork.) Mr. Lumsdaine further depones, " That about the time Ensign Heriot left Edinburgh to go to Ireland, or rather a little after he was gone, the said Mrs. Menzies told the deponent that the said Peggy Turner or Bar had been married to Ensign Heriot; that Mrs. Menzies was the only person who mentioned this to the deponent; and she mentioned, at same time, that Mrs. Elliot, sister to Jenny Christie, who was afterwards well known about Edinburgh, had been present at the marriage ceremony; and both Mrs. Elliot and Jenny Christie were in use to visit at Mrs. Menzies': That Peggy Turner or Bar remained in Edinburgh about a twelvemonth, or rather more, after Ensign Heriot went to Ireland, and the deponent saw her during that time occasionally at Mrs. Menzies': That the day before she set off for Ireland, she sent a message to the deponent desiring to see him: That he accordingly went to her lodgings or room: That she told the deponent she was going to Ireland to Ensign Heriot, and she gave the de-

“ponent to understand she was in want of money, and the
 “deponent gave her 20s. or a guinea, to assist in defraying
 “her expenses; and the deponent understood she was to
 “travel with the Glasgow carrier to Glasgow; and the said
 “Peggy Turner or Bar, neither at that time or any other,
 “ever said to the deponent that she was married to Ensign
 “Heriot; and the deponent did not ask whether she was
 “married or not. And being interrogated, If he ever
 “had any carnal connection with the said Peggy Turner
 “or Bar? The deponent declines to give any answer
 “to this question, being of opinion that he is not bound
 “to do so: Depones, that he never heard that the said
 “Peggy Turner or Bar, was possessed of any money or pro-
 “perty of any kind: And being interrogated, What sort of
 “woman she was in point of looks or behaviour? Depones,
 “That she was well looking, but her behaviour was not al-
 “together that of a well-bred gentlewoman: Depones, That
 “some months after Ensign Heriot left Edinburgh to go to
 “Ireland, he heard that Margaret Turner or Bar, had been
 “delivered of a child to him: Depones, That Jenny Chris-
 “tie, above mentioned, kept a house of bad fame at Edin-
 “burgh, a good many years after the period when the de-
 “ponent saw her at Mrs. Menzies’ as above mentioned, but
 “she had not then begun to do so; and there was no other
 “person present when Mrs. Menzies mentioned the mar-
 “riage to the deponent as above deponed to; and the depo-
 “nent never asked Mrs. Elliot about it; and he did not often
 “see Mrs. Elliot. Mrs. Elliot was a woman of bad fame.”

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When the appellant’s mother, Margaret, came to Ireland
 to join Ensign Heriot at Cork, General Watson, who was
 then captain of the regiment, deponed, “That upon occa-
 “sion of a woman coming over to Cork after Ensign Heriot,
 “and a report prevailing that he was married, he took
 “occasion to ask him whether it was so or not, and he an-
 “swered that he was not. Believes she stayed there a
 “very short time. The deponent never saw her; and be-
 “lieves the Ensign made the same declaration of his
 “not being married, to the other officers of the regi-
 “ment.” The other officers spoke to the same effect.

There were also letters produced, in answer to inquiries
 made to Ensign Heriot by his brothers, proving that he had
 uniformly denied that there was any marriage; but confess-
 ing that the boy was his son.

There was no proof of cohabitation in Ireland, at least of
 a nature to constitute the relation of husband and wife. But
 witnesses were adduced to prove that the Ensign and Mar-

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garet Turner had cohabited as husband and wife in Scotland. In particular, Mrs. Swan deponed, "That she recollects of " three persons, who lodged in her father's house in Edinburgh, Captain Frazer, Captain Sutherland, and a Captain Heriot: That Heriot had a wife, and he and his wife both " ate and slept in her father's house: That she has heard " the Captain and Mrs. Heriot call the child George: " That the lady was called Mrs. Heriot by the family, and " the Captain generally addressed her by the appellation of " my dear; but the witness once heard him call her Peggy: " That they remained some time in the deponent's father's " house, and were *visited by ladies and gentlemen*, who " called the wife Mrs. Heriot: That she heard they afterwards went to Ireland."

This evidence was given at the distance of fifty years, and referred to a time when the witness must have been about ten or eleven years of age; and there was no proof that the parties of whom she spoke were Ensign George Heriot and Margaret Turner. The only other proof of marriage by cohabitation in Scotland consisted of hearsay evidence, and a rumour that they had been married by a clergyman. Also, Mr. Boucher, an attorney in Ireland, gave evidence to his being employed for Mrs. Heriot, when in Ireland, to prosecute a certain individual who had ravished her there. He deponed that the proceedings were instituted in her name, designed as the "wife of George Heriot, late ensign of the " 25th Regiment of Foot." "Depones, That no person " gave in objections, or moved arrest of judgment, on account of her being designed the wife of George Heriot." It also appeared from this witness's evidence, that she had gone under the name of Margaret Taylor: That she told him that her maiden name was Turner, and that she was of the Turners of Turner Hall in Aberdeenshire, and was related to a clergyman of the name of Turner in the west of Scotland. There was no evidence that these statements were correct. But what made the evidence more complex was, the deposition of this witness, that he had known them both in Edinburgh when living there, serving his time in an office, and that they then co-habited together. And that in Ireland he had been employed to procure a certificate from the register of the clergyman, in Edinburgh, who was said to have performed the ceremony. This certificate was not adduced, nor was there any evidence of the existence of such a register. But the witness swore to his showing the certificate to Mr. Heriot when he returned to Ireland, and upon his doing so, that he (Heriot) stated,

that she was very foolish for procuring it, as he had never denied his marriage to her. And a Mr. Seton swore to Mr. George Heriot having introduced the appellant's mother to him as his wife.

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The Ramornie family seem, at the solicitation of the Ensign, to have taken and brought up the boy at Ramornie, and from their kindness in this, an inference was drawn in support of his claims. But, on proof, this turned out to be of a nature such as marked their belief of his illegitimacy. He was boarded in a poor man's house at 13s. 4d. the quarter, and only sent to the village school, and afterwards he was sent to the sea. At Ramornie, he was not admitted beyond the kitchen or parlour.

There was still further evidence to a great extent on both sides, for and against the marriage, but, on a final balancing of the whole, both original and that which was afterwards adduced, the Court pronounced this interlocutor: "The Mar. 9, 1798.

"Lords having advised the petition for the Honourable Mrs. Margaret Maitland Makgill, and James Maitland Makgill, now James Heriot pursuers (respondents), with the additional petition for them, answers for George Heriot, defender, to both petitions, additional proof led, and writs exhibited for both parties, they alter the interlocutor reclaimed against, and, in terms of the former interlocutor of the 5th of July 1793, sustain the reasons of reduction, and reduce, decern, and declare, in terms of the conclusions of the libel." On reclaiming petition the Court adhered. May 23, 1798.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. Because it is established by the evidence in this cause, that the appellant's father and mother were married persons. 2. Because it is admitted, that if the testimony of John Boucher is to be believed, there is no doubt of the marriage in question. But no ground has been stated which impeaches the character of this witness, and no objection has been urged against his deposition, which makes him unworthy of credit. To put the matter beyond question, the appellant has offered to establish the integrity of his character by persons of respectability, whose names are condescended upon; and if there could be room for doubt, it is against justice to deny to the appellant the means of establishing, by the evidence of respectable persons, that this witness is worthy of being believed.

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Pleaded for the Respondents.—1. The appellant has contended that the verdict obtained in his favour by a mere casting vote of the Court, changed the case, and threw the onus of proving on the respondents; but this cannot be regarded by any one acquainted with law and the course of procedure in such cases. The jurisdiction of the Court of Session to admit additional evidence, as they may see cause, is unquestionable, and, accordingly, they did so repeatedly in the present case. A reduction of a service on verdict brought instantly, as it was here, leaves parties precisely where they were before the verdict, and is analogous to a new trial. Of the actual celebration of the marriage between the appellant's reputed parents there is no evidence, unless Boucher's swearing that he obtained a copy of the entry made in the register of the clergyman who is said to have performed the ceremony, be reckoned such. But Boucher is plainly a tutored witness, and unworthy of credit. The story he tells is extremely improbable. There is the greatest reason to believe that no such register ever existed, and if it did, there is no probability that the clergyman would sign a copy of the entry, and give it to Boucher. The testimony he gives is inconsistent with that of others, and even with itself. The character for piety and virtue he bestowed on the appellant's mother he *must* have known to be false, if he knew her at Edinburgh, as he swears he did. His conduct too, in framing and carrying into effect Highly's deed in favour of the appellant's mother as a *feme sole*, gives the lie to what he now swears, of his all along believing her to be the wife of Heriot then alive, and his aiding and countenancing a scandalous forgery, meant to do away with the force of that genuine deed, completely blasts his credibility. But even if his evidence were pure, and not liable to such objections, it would be dangerous to allow a marriage to be established by the single testimony of such a fact. The clergyman is dead,—the record is not to be found, and the alleged copy not produced, how is it possible to confute such a witness?

2. Cohabitation as husband and wife for a length of time may establish marriage, but here the proof of cohabitation in Scotland rests entirely on the testimony of *Boucher*; and the want of other testimony is alone sufficient to destroy him. If the parties had lived together openly, and so long, as married persons at Edinburgh, there would not have been such a penury of witnesses to prove that fact; while the alleged

cohabitation in Ireland rests upon testimony equally objectionable and unworthy of credit. And it is positively contradicted by the evidence of the officers of the regiment while in Ireland, and of Ensign Heriot's most intimate acquaintances, Mrs. Kelly, M'Gregor, and Weston. It is clear therefore that there was no such cohabitation as is necessary to establish marriage.

So, 3. Although a repute of marriage between the parents, and of the legitimacy of the issue, may also go to establish marriage and legitimacy, yet the evidence in that case must be of general repute. Not only general, but uniform and long continued, and unshaken for a length of time. There is no such general and uniform repute proved in this case ; but the contrary. And the evidence against the marriage far outweighs that brought to establish it.

In a case like this, it is of great consequence to attend to the conduct of the parties, as from thence inferences of a nature the best possible may be drawn. In a few months after the alleged marriage, Ensign Heriot left this woman with child, and destitute, though he was in affluence. When she joined him a year after, he denied she was his wife, and she immediately disappeared, without persisting. From that time to the period of his death,—a space of twenty-seven years, there is not the least credible proof of his having acknowledged her as his wife, or the appellant as his lawful child. On the contrary, it is proved that he repeatedly, solemnly, and uniformly disowned the connection ; and, particularly, he did so in a letter to his brother, Dr. Heriot, when adjured to disclose the truth.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellant, *R. Dundas, Wm. Macleod Bannatyne, Henry Erskine, John Burnet, M. Nolan.*

For the Respondents, *Sir J. Scott, R. Blair, Wm. Grant, Wm. Adam.*

ADAM STEWART, Writer in Edinburgh,	<i>Appellant ;</i>
LIEUT. JAMES M'DUFF, - - -	<i>Respondent.</i>

House of Lords, 21st May 1799.

AGENT AND CLIENT—NEGLECT.—Circumstances in which an agent raised a reduction of a bond, omitting to observe, from the know-

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ledge in his possession, that this step had been already taken, and the decree of reduction already in his possession. In an action for the expense of this second reduction; held the client not liable.

A bond for £50 had been granted by the respondent to Colonel William Robertson, and to set aside which he had brought an action of reduction, on the ground that it was unduly solicited from him by the colonel, while under interdiction, and without the consent of his interdictors, or full value given.

In this action of reduction the colonel did not appear, and decree, reducing and annulling the bond was pronounced and extracted.

An action of furthcoming had been at the same time brought by a creditor of Colonel Robertson (Colonel Crawford) who had arrested the £50 bond; and to this action a plea was stated, founded on the reduction, yet the Lord Ordinary, in the furthcoming, sustained the bond though reduced in *spretia interdictione*, and found the defender liable to the extent of £20, in respect that the defender had admitted that this sum was due, independently of the bond, and decerned accordingly; and Colonel Crawford, the arresting creditor, obtained a decree in his favour for that sum. He proceeded to do diligence, when the appellant, as a law agent, was employed to settle the matter for the respondent; which he did by paying the £20 and obtaining a discharge of the same.

Some three years afterwards the same matters in dispute were raised by a son of Colonel Robertson; and the appellant, instead of founding on the matter as finally closed, pretended ignorance of the effect and nature of the previous procedure, entered into a long correspondence, proposed a reference to arbiters, and finally brought a second reduction of the bond, although he knew the bond was finally voided by an extracted decree of reduction. In this second reduction, the bond was reduced on the ground stated in the former action, namely, as being in *spretia interdictione*.

In these circumstances, the present action was raised by the appellant against the respondent for his account of expenses incurred in these latter proceedings. In defence, it was maintained that the second action of reduction was totally unnecessary, and highly injurious to the respondent, and that it could only have proceeded from ignorance of the

effect of the former reduction, and from neglect to observe that the bond had been already reduced.

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The Lord Ordinary pronounced this interlocutor:—" In respect it is sufficiently proved that the pursuer (i. e. appellant) had at different times in his possession Colonel Crawford's decret of furthcoming, which recites a decret of certification, reducing Lieut. M'Duff's bond for £50 to Colonel Robertson for nonproduction, nevertheless the pursuer, (the now appellant), *by negligence* not having adverted to that decret of certification, raised a new process for reducing the said bond against Colonel Robertson, wherein production of the bond was made, and decree in absence obtained; the expense of which decret is the subject of the present process; and as that second process of reduction brought by Mr. Stewart's mistake, was not necessary to be brought in that form, it would be unjust to lay the whole expense thereof on Lieut. M'Duff, yet as, on the other hand, the bond was produced in the second process, and Lieut. M'Duff, by the decret therein, is now absolutely out of all hazard of being disturbed by that bond, he ought to bear some part of the expense; finds him liable in *one* half thereof, and also finds him bound to assign to Mr. Stewart the decret against Colonel Robertson for expenses, in so far as concerns the half thereof, which, by this interlocutor, had been laid on Mr. Stewart; finds Lieut. M'Duff liable also for the other article of £3. 6s. 8d. claimed in this process; finds himself further liable in the expenses of extract in the process, but in no other expenses; and decerns, and dispenses with any representation." On reclaiming petition by both parties, the respondent's petition contending that the claim was incapable of division, and that the Court ought to have either sustained the claim in *whole*, or rejected it in whole upon the ground of negligence. Whereupon the Court "sustained the defences, and assoilzied the defender, and found the pursuer (appellant) liable in expenses." And, on second petition, they unanimously adhered.

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May 12, 1796.

Feb. 6, 1798.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The sum concluded for was *bona fide* laid out for the respondent on his express employment, and the steps taken were resorted to under the advice of Mr. Ferguson, advocate, the respondent's counsel. Having proceeded under such advice, the agent is exonerated

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from all blame and all charge of neglect. And even supposing there had been an error in the proceedings, from the former decree of certification in absence rendering a second process of reduction unnecessary, still it did not follow that this could preclude the appellant's claim for payment of his account. The appellant did not raise the first reduction. He did not act as agent therein; and the only access the appellant had to know of its existence, was from his being called to settle the claim under the decree of furthcoming in favour of Colonel Crawford. The mere drawing a discharge for the debt obtained in that furthcoming three years before the second reduction, was no ground for maintaining the defence against the claim, because a decree of certification in absence is not necessarily final; and there is a solid distinction between the case of an agent culpably neglecting what he knows was essential for the interest of his client, as, for example, to lead an adjudication within year and day of other adjudications, or to expedite a confirmation *debilo tempore*, and one who, from over anxiety, does more than is strictly necessary. Besides, Colonel Robertson had written letters threatening to insist in his claim, and after these it was not reasonable to expect that he would allow the decree in absence to stand; and, therefore, notwithstanding the decree of certification in absence, it was proper and necessary to raise a process of reduction. This action was successfully pursued to a termination, after appearance made both for Colonel Robertson and Colonel Crawford, and the defender has taken and reaped all the advantage of that decree.

Pleaded for the Respondent.—The appellant has given up his former plea, that the prior decree of certification was utterly *unknown* to him at the time of raising the action of reduction complained of. He now argues, as he did latterly in the Court below, that he was completely in the knowledge of that former decree. The question then is,—Whether the appellant, having full information of that fact before him, could, consistently with the faithful discharge of his duty as an agent, bring a *second* action upon the self same grounds, to the effect of loading his client with the expense of a measure, which he must have been satisfied could answer no purpose, since the object meant to be gained by it was already accomplished by the decree in the first action? All agents are responsible to their client for misconduct in conducting the proceedings which they are employed to conduct.

And it makes no difference in this rule, whether this misconduct consists in *omitting* to do what the agent ought to have known was *necessary*, or in actually doing what he ought to have known was *unnecessary* and injurious; and it being incontestible, that the decree obtained in the first process was amply sufficient for the respondent's security against the effect of the bond, until that decree was reduced *legitimo modo* in a process of reduction, it makes no difference whether the proceedings so taken were ultimately successful, or whether the respondent derived benefit from them or not.

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After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be, and the same are hereby affirmed, with £200 costs.

For Appellant, *Sir John Scott, George Ferguson, Neil Ferguson, Wm. Tait.*

For Respondent, *Wm. Adam, Thomas M'Gregor.*

 (M. 12375.)

ROBERT PAUL,	.	.	.	.	<i>Appellant;</i>
JOHN CADELL, Esq.,	.	.	.	.	<i>Respondent.</i>

House of Lords, 30th May 1799.

PROOF—WITNESS—PRODUCTION OF BOOKS.—In an action of damages for libel, brought against two parties, the one the publisher, the other the editor and proprietor of the "Scots Chronicle" Newspaper; the defence stated by the latter was, that he was not the proprietor, or any way concerned in the paper. A witness was summoned as a haver, to produce all the account books, ledgers, &c., of the Scots Chronicle office, prior to his becoming the proprietor, in order to prove that the defender was proprietor at the period mentioned. The witness refused, in respect that it would disclose his own private affairs. The Court found him bound to allow inspection of the books to the Commissioner, and to take excerpts. On appeal to the House of Lords by the witness, this was affirmed.

An action of damages was raised against "John Johnstone, as the publisher, and John Morthland, Esq., advocate, as the editor, proprietor, legal adviser, and

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“ abettor of, or otherwise held, believed, and understood to
 “ be concerned in conducting, printing, and publishing the
 “ periodical paper called the ‘ Scots Chronicle,’ ” for pub-
 lishing a libel on the respondent’s character in that
 paper.

The appellant was the real proprietor of the paper, hav-
 ing acquired the property thereof sometime previous to the
 facts complained of by the respondent.

Defences were lodged by Mr. Morthland, denying that he
 was proprietor, or any way concerned in the paper. Parties
 having joined issue on that point, a proof was allowed, and
 a remit made to the Sheriff, commissioner, to take the
 proof.

As it was proved by one of the witnesses that Mr. Morth-
 land occasionally wrote entries in the books of the Scots
 Chronicle, it was expected that, from these entries, certain
 evidence would appear to establish his connection with the
 concern ; and the appellant, in whose possession these books
 were, being cited to give evidence as a haver, on the part
 of the respondent (pursuer); and being asked to produce all
 the books of the concern, he declined to do so, in respect it
 would disclose his own private affairs, he being now the
 proprietor of the Scots Chronicle, and of these books. He
 was also asked to allow inspection of his books prior to the
 period when he became proprietor, on condition that the
 part which referred to his own transactions should be fold-
 ed down, but he refused : Whereupon the respondent ap-
 plied by petition to the Court for letters of *first* and *second*
 diligence against havens for the production and inspection
 of the journal, ledger, order, cash, letter, and ALL OTHER
 books kept and used in the Scots Chronicle office prior to,
 and at the period of the publication of the article in the news-
 paper founded on in this action. The petition was an-
 swered by stating that the respondent had not stated any
 one article or entry in the books which, if exhibited, would
 prove the fact put in issue between him and Mr. Morthland ;
 but the Court, on report to it, was pleased to pronounce this
 interlocutor :—“ The Lords having advised this petition,
 “ with the answers thereto for Robert Paul, and heard
 “ parties’ procurators thereon, grant warrant for letters of
 “ first and second diligence at the instance of the petitioner
 “ against havens, for the production of the journal, ledger,
 “ order book, cash book, letter book, and all other books
 “ kept and used in the Scots Chronicle office, prior to and at

Jan. 19 and
 22, 1799.

"the period of the publication of the newspaper founded on
 "in this action, that the same may be inspected by the
 "commissioner for taking the proof in this cause, and he
 "may take such excerpts therefrom as he shall think mate-
 "rial to the issue; renew the commission to the commis-
 "sioner formerly named for proving the facts *hinc inde*
 "formerly admitted to probation, grant diligence at the
 "instance of both parties against havers and witnesses."

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Against this interlocutor the present appeal was brought to the House of Lords by the appellant.

Pleaded for the Appellant.—The judgment appealed from goes to establish a novel doctrine, that the pursuer, asserting matter of fact in his libel, and undertaking to prove it, may compel a third party to produce or allow inspection of all his books and papers, in order that it may be discovered whether they contain any thing which can be made evidence in a matter in which he is not concerned: hitherto it has been understood, that one who comes into a court asserting a fact, must be prepared with his evidence, or able to say upon what he proceeded; but to proceed in the manner proposed, thus to fish for evidence, is new in practice, and against all principle. The interlocutor establishes that the whole books and papers of a *third party*, and of course all his private concerns, may be canvassed and exposed; an exposure possibly ruinous, and certainly vexatious and injurious, merely because it is alleged that *perhaps* those books and papers *may* contain something *which may be* made evidence in a cause to which he is a stranger. The appellant has sworn in evidence, that he became the sole proprietor of the paper in March 1797; and yet the respondent's object is, to prove by his books, that another person was really the proprietor. The Court has modified the respondent's demand, by only allowing the books to be examined by the commissioner, to take excerpts of all that he might think material to the issue; but this course is equally exceptionable as the former general and sweeping demand, because it makes the commissioner judge of what is, and what is not evidence, thus precluding the parties and the witnesses from their undoubted right of objecting to the admissibility of any thing tendered as evidence.

Pleaded for the Respondent.—There is no ground for maintaining that the appellant is the real and sole proprietor of the newspaper called the Scots Chronicle, and, consequently, in that character, he is not entitled to oppose the

1799. inspection of the books of that office. Even if he was the undoubted proprietor of the newspaper in question, he is not entitled to refuse inspection of such parts of these books as are material to the decision of the present cause, depending between third parties, so that whether the appellant be the proprietor of the Scots Chronicle or not, the respondent is, by the law and practice of Scotland, entitled to such an inspection as the interlocutor of the Court of Session allows.

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v.
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After hearing counsel, it was
Ordered and adjudged that the interlocutors complained of be affirmed, with £100 costs.

For Appellant, *T. Erskine, W. Adam.*

For Respondent, *R. Dundas, W. Grant.*

(Writ in Error)

From Exchequer in Scotland.

ROBERT DUNDAS, Esq. His Majesty's	}	<i>Plaintiff in Error;</i>
Advocate General,		
WILLIAM MENZIES, Spirit Dealer,	}	<i>Defendant in Error.</i>
Glasgow,		

House of Lords, 7th June 1799.

DISTILLERY LAWS—LICENSE.—A distiller having a distiller's license for the manufacture of spirits, which expired on 10th Oct. 1797, gave notice to the crown on 10th June 1797 that he had ceased to be a distiller, and had disposed of the same to a third party, he at sametime having 11,500 gallons of spirits on hand; the question was, whether he could sell these under his distillery license, which was then current and not expired, or was bound to take out a new license as for a wholesale dealer, he having ceased *de facto* to be a distiller? The Court of Exchequer, on a special verdict of a jury argued before them, found for the defendant in error; but reversed in the House of Lords, and held, that the moment he renounced the character of distiller, he was bound to take out a license as a dealer or seller of spirits.

The defendant commenced the business of a distiller, and, in terms of the statute, granted bond to the crown, with one sufficient surety, for the regular payment of the duty on two stills to be licensed to him for distilling spirits at

Gorbals of Glasgow, for one year, from the 10th day of October 1796 to the 10th day of October 1797. The license as a distiller was taken out for this period also.

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The defendant made due and regular payment of the license duty in advance, up to 10th June 1797, when, having resolved to give up the concern, and transfer the distillery, he gave notice, of that date, to the crown, that he had sold and disposed of the same accordingly to a Mr. Moffat.

At the time he so disposed of the distillery, he had 11,500 gallons of spirits on hand, the whole duties for the stills, in which these spirits were made having been paid. And the question was, Whether he could dispose of them under his own certificate, without taking out a license as a wholesale dealer, the acts enjoining that all such, "Not being a re-tailer, nor a rectifier, nor a distiller, shall" take out license.

The defendant maintained, that being a distiller, and his license as such paid up to 10th October 1797, he was not to be viewed as a wholesale dealer, but entitled to dispose of his spirits under his distillery license until that license expired; and consequently all the spirits disposed of by him between 10th June and 7th October 1797, when that license expired, must be viewed as under the exception of the acts.

The Court of Exchequer, on a special verdict, argued before them, found for the defendant.

Dec. 9, 1798.

Against this judgment the present writ of error was brought to the House of Lords.

Pleaded for the Plaintiff in Error.—The defendant in error having, by his own voluntary act, renounced and given up the character of a distiller, and ceased to pay duty as such, from and after 10th June 1797, he was not entitled any longer thereafter to enjoy the privileges legally attached to that character. His character of licensed distiller ceased *de facto* after the 10th June 1797, and was most completely extinguished *de jure* after the 10th of October 1797, when the defendant's license, even upon the supposition of his having gone on distilling and paying duty up to that period, was wholly at an end, and his character as a licensed distiller, did entirely cease and determine. Further, because the defendant in error, either *de facto*, after the 10th of June, or *de jure* after the 10th of October 1797, did cease to be a licensed maker or distiller of spirits, and, consequently, then fell under the description of a *dealer* in

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spirits, by having in his possession above 63 gallons of spirits, which, by the act 6 Geo. I. c. 21, § 18, subjected him to the survey of the officers of excise; and as such dealer by whole-sale he was required by the statute 33 Geo. III. c. 69, § 9, to take out a license, and to pay for the same the sum of £3; his refusal to do which has occasioned the present prosecution.

The privilege granted to a licensed distiller of sending out spirits made by him from the place of their manufactory with his own certificate, instead of the excise permit, is in like manner confined to the person holding such certificate, and to the time during which he possesses it; for the 22d section of the 28th Geo. III. c. 46, requires that the certificate shall be subscribed at the place of the manufacture, and at the time of the removal of the spirits by him who *is*, and not by him who *has been*, the licensed distiller or maker thereof, or his known or authorized clerk or agent.

Pleaded for the Defendant in Error.—The acts of parliament requiring persons dealing in spirituous liquors to take out a dealer's license, do not apply to any persons but such as buy and sell spirits, such only being dealers, in the proper sense of the word; and accordingly these statutes expressly except distillers and rectifiers, who do not buy and sell spirits, but only dispose of the spirits which they have made, in virtue of their license to distil. The expiry of the distillery license cannot prevent him from selling the spirits which had been made in his licensed distillery before such license expired; and by selling such spirits in these circumstances, he cannot be said to have assumed the character of a dealer in spirits, so as to be liable to the penalties of the acts, unless a *dealer's* license be taken out. To be a dealer in the sense of the act, it is necessary to be a buyer and seller of spirits; but the defendant is neither a buyer and seller of spirits, nor has he bought any spirits at all. He is merely disposing of the spirits made by him as a licensed distiller, before his license expired. And though his license to distil has expired, yet, in selling the spirits so distilled, under his expired license, he does not fall under the description of *dealer*, because he neither buys spirits, nor takes them into his custody, which is the criterion of a dealer given by the statute.

After hearing counsel this day, to argue the error assigned in this cause: The following question was put to the judges,—Whether, upon the matter stated in the special

verdict, the plaintiff in error was entitled to judgment on all or any of the counts on which that verdict was found? 1799.

Whereupon, the Lord Chief Baron of the Court of Exchequer, having conferred with the rest of the judges present upon the said question, delivered their unanimous opinion, that the plaintiff in error was entitled to judgment on all counts on which that verdict was found. Then

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Ordered and adjudged that the judgment given in the Court of Exchequer in Scotland be reversed; and it is further ordered and adjudged, that judgment be entered for the plaintiff in error.

For the Plaintiff, *Sir John Scott, R. Dundas, John Mitford, Geo. Wood.*

For the Defendant, *Wm. Grant, Wm. Adam, Henry Erskine, Jas. Montgomery.*

Writ in Error, by Bill of Exceptions.

ANDREW HUME, Officer of Excise, prosecuting for His Majesty and Self,	} <i>Plaintiff in Error.</i>
JAMES HAIG and JOHN HAIG, Distillers at Lochrin, . . .	
	} <i>Defendants in Error.</i>

House of Lords, 11th June 1799.

DISTILLERY LAWS—SURVEY.—Question, Whether the officers of excise were legally entitled to make a survey of distilleries with reference to a new act of Parliament, regulating the duties payable, and mode of exacting them, *before* the passing of the act; or whether they could make such survey under any previous existing act not then repealed? By the Court of Exchequer in Scotland, held such survey, before the passing of the act to be illegal. Reversed in the House of Lords.

Prior to 1798, the excise distillery duty throughout Scotland was much increased in amount, besides being altered in the principle and mode of exaction. The duty was laid on the size of the still, and not the quantity of wash, of low wines, or of spirits produced from it. As a necessary consequence of this system, all survey of the manufactured

1799. commodity, and taking account of the quantity, by the excise officer, was given up.

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On the 15th June of that year, certain resolutions were passed in the House of Commons and agreed to, that an excise duty of 1s. 6d. per gallon additional be charged on all British spirits which might be found in the possession and custody of any distiller, &c., on and after 15th June 1798, by the surveying officers of excise. A bill was brought into Parliament embodying these resolutions. It was agreed to by both Houses, and finally passed into an act of Parliament on the 29th of June.

Stat. 38 Geo.
III. c. 92.
(June 29,
1798.)

Before this act was passed, and in terms of an Order in Council proceeding from the Treasury, all excise officers were ordered, in terms of the resolutions, to survey all the distilleries in Scotland, and to take account of the quantity of spirits on hands, in order to charge the duty in terms of the above resolutions. The officers came to the Lochrin distillery for that purpose on the 18th June, but were refused admittance. The officers of excise met with the same opposition at other distilleries in Scotland, on the ground, as was alleged, that they had no right to take such account under the existing laws. The excise officers were obliged to resort to the aid of the military. They returned to Lochrin distillery, supported by military force, and effected a survey on the 21st and 22d June.

This survey being taken, the defendants were charged with the duty, and, on payment being refused, a bill was filed in the Exchequer Court against them. The question involving one of pure law for the Court, the Chief Baron directed the jury to return a special verdict, leaving that question to be decided by the Court; but if they chose to return a *general* verdict, he would now state his opinion

Jan. 17, 1799. and that of the other Barons, to be, "That the said officers
" of excise were not authorised by law to make such sur-
" vey on the 19th, 20th, 21st, and 22d days of June last
" past, the same being before the passing of the said act
" made in the 38th year of the reign of his present Majesty;
" and that the said survey, made by the said officers, on
" the said days, was not such actual survey, as by and under
" the provisions of the said statute, was sufficient to charge
" the said defendants with the said further duty above men-
" tioned, and with that direction left the same to the jury."
In consequence of this direction, the Lord Advocate for the
plaintiff in error, tendered a bill of exceptions, to the

opinion of the Chief Baron so delivered to the Jury; which exceptions being sealed up by the Chief Baron, according to the statute made and provided thereanent, (39 Geo. III.) the jury returned a verdict for the defendants on the whole counts. And judgment was given in terms of the verdict.

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Against this judgment the plaintiff in error brought the present writ in error to the House of Lords.

Pleaded for the Plaintiff in Error.—The officers of excise had a right to make a survey upon the defendants and other distillers in Scotland, on or after the 13th, and prior to the 29th June 1798, under the then existing laws, for the purpose of ascertaining the quantity and strength of the spirits in their possession, so as to be charged with the additional duty imposed by the stat. 3 Geo. III., cap. 92, § 2. The defendants in error were at the time not only licensed, but entered distillers, and their distillery, where the officers made their survey, was an entered place, into which these officers had a right to enter, and take account under the general provisions of a former statute, still unrepealed, 6 Geo. I. c. 21, § 14,—a statute which authorized this, not so much for the purpose of ascertaining the amount of duties, as for preventing fraud, by the introduction of smuggled spirits, and is not virtually repealed by the alteration of the duties in exonerating the spirits of the duty, and laying it upon the contents of the still. Neither is the act of 6 Geo. I., nor any other act relative to the distillery, prior to the 28 Geo. III. c. 46, expressly or completely repealed by the license act, because its 83d section does anxiously provide that all the regulations, provisions, &c., in the distillery acts in force at the time of passing the statute 24 Geo. III. sec. 2, c. 46, and the stat. 26 Geo. III. c. 73, shall be continued and in force, except, 1. Where the same are expressly altered, repealed, &c., by the 28 Geo. III. c. 46. 2d. Where the same are *repugnant* to any of the matters, provisions, or regulations, in 28 Geo. III. c. 46. That, therefore, under the statute 26 Geo. III. c. 64, and 28 Geo. III. c. 46, § 21, it was “lawful to and for the officers of excise “to enter by day or night into the still-house, or other “place or places, where any still or stills shall be kept, and “to examine the same.” And the statute, 38 Geo. III. c. 92, upon which the information in the present case was brought, expressly recognized this to be still an existing power under the former acts, by ordering a survey of the

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distiller's stock to be taken, in order to charge the additional duty. The statute, although only passed on June 29, 1798, was made to have a retroactive effect, and made to take effect from the 13th of June. And this being the case, it was necessary to survey the distilleries in the interval, so as to take the stock as at that date, otherwise the act would be completely nugatory for 16 days, during which time every possible means might be taken to evade it.

Pleaded for the Defendants in Error.—The duties for which this information was brought have been imposed by the act 38 Geo. III. c. 92, on all British spirits distilled for consumption in Scotland, that shall be “found on the first actual survey by the proper officer of excise, upon or after the 13th June 1798, in the stock, custody, or possession, of any distiller, rectifier, dealer in or rectifier of spirits.”

By the words, actual survey, must be meant not merely a survey *actually* made by an officer of excise, but a survey *legally* made under the authority of the law; for the legislature cannot be presumed to sanction or give any effect to an illegal act. The act provides, that *from and after passing thereof*, the officer of excise shall be entitled by gauging, measuring, or otherwise, to take an account of the quantity of the spirits in the hands of the distiller; but it does not declare, that any survey made, or account taken, *before* the passing of the act, shall be legal; and as the survey, on which the present charge in the information is founded, was made *before* the passing of the act, it is perfectly clear that the opinions of the Barons of the Exchequer, that the officers of excise were not authorized by law to make such survey, was well founded, unless indeed it can be shown, that by the former acts they were entitled to make such survey. Whatever an officer of excise does under new powers, devolving on him by a new act of Parliament, these powers cannot be put into operation before the passing of the act, because the statute being the warrant of these new powers for charging the duty, nothing can be legally done until it has passed into a law. And it is not enough to say, in answer to this, that the officers of excise had power to enter distilleries under the previous acts still unrepealed in these respects, because, if they did not enter into these distilleries to take a survey as under these old acts, but manifestly for a different purpose, namely, to serve the purpose of the new act imposing the additional duty, it is clear that

this circumstance, even if unquestionable, could not legalize their proceedings. But, in point of fact and law, they had no such powers that could be held as still subsisting under the old acts, because these had been repealed, and quite a new system of exacting the duty imposed, which dispensed altogether with the necessity of a survey, such survey being in fact entirely inconsistent with the mode then adopted of levying the duties by the contents of the still. The powers which the previous statutes, imposing the license duty, gave to the officers to enter the distillery, was merely to examine to the effect of managing and levying the duties thereby imposed, and not to survey and take account of the stock, which construction of the acts is fully supported by the legislature imposing a license duty. But, supposing the survey in this case *before* the passing of the act were legal, it was not an actual survey, because the officers did not produce the specification of the gauges of the casks, or utensils, from which the general amount of the spirits was said to be calculated.

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After hearing counsel this day, to argue the errors assigned in this cause, the following questions were put to the judges:—

Whether the officers of excise were authorised by law, to make the survey stated in the information on the days therein mentioned?

Whether the survey so made by the officers was such actual survey, as by and under the provisions of the act of the 38th of His Majesty's reign, cap. 92, was sufficient to charge the debtors in error with the further duty imposed by that act?

Whereupon, the Lord Chief Baron of the Court of Exchequer, having conferred with the rest of the judges present upon the said questions, delivered their unanimous opinion in the affirmative.

Then it was

Ordered and adjudged that the judgment in the Court of Exchequer in Scotland be reversed. And it is further ordered and adjudged, That the said Court of Exchequer do award a *venire facias de novo*, and proceed according to law, and that the record be remitted to the said Court of Exchequer in Scotland.

For Plaintiff in Error, *Sir John Scott, R. Dundas, John Mitford, Geo. Wood.*

For Defendants in Error, *W. Grant, W. Adam.*

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CRAUFORD, &c.

v.


COUTTS, &c.

(M. 14958.)

MRS. ELIZABETH CRAUFORD, Widow of the
deceased JOHN HOWIESON, Esq., and WIL-
LIAM BEVERIDGE, W.S., her surviving Trus-
tee, } *Appellants ;*

THOMAS COUTTS, Esq., Banker, and SIR RO-
BERT CRAUFORD, Bart., eldest Son and
heir of SIR HEW CRAUFORD of Jordan-
HALL, Bart., } *Respondents.*

House of Lords, 11th July 1799.



DEATH-BED—REVOCATION—APPROBATE AND REPROBATE.—A party in 1771 executed a settlement of his estates to one who was not his heir at law, under express reservation to revoke and alter, in whole or in part, at any time in his life, *et etiam in articulo mortis*. In 1793, he executed a settlement conveying his estates of Craufordland to and in favour of a different party, (Mr. Coutts,) whereby he expressly revoked the deed of 1771, but only to the effect of sustaining the deed 1793. The deed of 1793 was executed on death-bed. In a declarator and reduction of the deeds 1771 and 1793, brought by the heir at law, setting forth, that as the deed 1771 was revoked by the deed 1793; and as the latter was executed on death-bed by the deceased, her right as heir at law had revived, and that she was entitled to have them reduced as to her prejudice. Held, that as the deed of 1771, was executed in favour of a stranger, she had no interest, as the deed 1793 could not be said to be in prejudice of the heir; and also, that she could not approbate and reprobate the same deed (1793); and that this deed, being executed in virtue of reserved powers to alter on death-bed, was not reducible. In the House of Lords, the case was remitted for reconsideration, with considerable doubts expressed as to the soundness of the judgment.*

Colonel John Walkinshaw Crauford, proprietor of the estates of Craufordland and Monkland, in the county of Ayr, did, on the 17th day of June 1771, execute a disposition or settlement, by which, for the purpose therein declared, of keeping up the representation of his family in the male line, he (having no prospect of issue himself) conveyed both estates “to himself *in liferent*, and to the heirs

* For what was done under this remit, *vide* second appeal in this case, 6th Aug. 1803, and 14th March 1806.—*Infra*.

"male of his own body in fee; whom failing, to the late Sir 1799.
 "Hew Crauford, Bart., and the heir male of his body,"
 "&c. This deed contained a clause dispensing with de- CRAUFORD, &c.
r.
 livery, but reserved to himself full powers to revoke or alter COUTTS, &c.
 it in whole or part, at any time of his life, *etiam in articulo*
mortis, and to dispose of the estate otherwise, and burden
 the same at pleasure. The deed was never delivered to the
 disponent, but remained with the granter until his death,
 when it was found in his repositories uncanceled.

Prior to his death, and while in Edinburgh in February
 1793, he executed a new disposition and settlement of the Feb. 13, 1793
 estate of Craufordland in favour of the respondent, Mr.
 Coutts, and his heirs and assigns, with all the clauses
 as in an original conveyance. The deed also assigned to
 him his personal estate, and also other real estate not con-
 tained in the deed of 1771, consisting of superiorities. It
 further contained this clause, upon which the present ques-
 tion principally arose:—"And I hereby revoke and recall
 "all former dispositions, assignations, or other deeds of
 "a testamentary nature formerly made and granted by
 "me, to whatever person or persons, preceding the date
 "hereof, and particularly a deed granted by me in the
 "year 1771, settling my estate upon Sir Hew Crauford of
 "Jordanhill, Bart., and his heirs: And I declare the same
 "to be void and null, so far as these deeds are conceived
 "in favour of the persons to whom they are granted, but to
 "be valid and sufficient to the extent of the powers therein
 "reserved to me to revoke, alter, or innovate the same, to
 "the effect only of making these presents effectual in favour
 "of the said Thomas Coutts and his foresaids."

Of the same date, Colonel Crauford executed, in favour of Feb. 13, 1793.
 Mr. Coutts, a conveyance, in the form of a bargain and sale,
 of the estate of Monkland, bearing a price paid (of £5000);
 but this, it was stated, was a mere device; it being alleged
 that no price was actually paid. Mr. Coutts was to have
 granted a bond for that sum, but before that could be
 returned from London, Colonel Crauford died, of this date. Feb. 19, 1793.

The Colonel, at the time he executed these deeds, was in
 bad health, and had contracted his mortal sickness, which
 terminated in death six days thereafter. In these circum-
 stances, the appellant, Mrs. Elizabeth Crauford or Howicson,
 the decedent's aunt, as heir of line of her nephew, brought
 an action of reduction and declarator on the head of death-
 bed, against Sir Hew Crauford, the disponent under the set-
 tlement of 1771, (the person entitled to take under that

1799. deed, if it had not been annulled), and also against Mr. Coutts, the dispocee under the settlements 1793, to have the latter deeds set aside, and her right to succeed to the estates established. In defence for Mr. Coutts, it was maintained, that Colonel Crauford had unlimited powers to dispose of the estates, and, admitting that the deeds 1793 were executed on deathbed, he contended, that as Colonel Crauford had reserved power to himself by the deed of 1771, (which was executed in *liege poustie*, and conveyed these estates to a stranger, thereby disinheriting the appellant, his heir at law), to alter the deed at any time during his life, *et etiam in articulo mortis*, the law of deathbed could not apply, as the latter deeds so executed, were granted as an exercise of the powers thus expressly reserved.

The Court of Session pronounced this interlocutor:—
 June 12, 1795. “ Upon report of the Lord President, in absence of Lord Stonefield, the Lords sustain the reasons of reduction, in so far as they respect the superiority of the lands in the county of Renfrew, contained in the charter 12th February 1725, from the then Prince of Wales, as Prince and Steward of Scotland, and reduce, decern, and declare accordingly; *repel the reasons of reduction, in so far as they respect the lands of Craufordland*, and others, contained in the disposition by the late Colonel Crauford to the defender, Thomas Coutts, of date 13th February 1793; assoilzie the defender, and decern: Find that the alleged sale of Monkland estate, set forth in the other deed, of the same date, 1798, was an unfinished transaction, and remit to the Lord Ordinary to hear parties’ procurators further thereon, and to do as he shall see just: Remit also to his Lordship to hear parties’ procurators upon any claim competent to the pursuers under the disposition and tailzie 1719 (1771?) and to do therein as he shall see cause.” On re-
 Nov. 17, 1795. claiming petition, the Court adhered. And afterwards, upon the report of Lord Stonefield, the Lords found “that the set-
 Jan. 31, 1798. tlement executed by John Walkinshaw Crauford, in the year 1771, was effectually revoked by the clause of revocation contained in his after settlement in the year 1793, in consequence of which the lands of Monkland and pertinents, now belong to the pursuer as heir of line, and that she has right to make up titles to them accordingly, and decern.”

Against this last judgment an appeal was brought by Sir Robert Crauford to the House of Lords, but was dismissed for want of prosecution.

The appellants, Mrs. Howieson and her trustee, brought the present appeal against the interlocutor of 12th June 1795, in so far as it sustains the deed of 1793, and repels the reasons of reduction thereof : and also against the said interlocutor of 17th November 1795, adhering thereto.

Pleaded for the Appellants.—The deed 1771 in favour of Sir Hew Crauford, which disinherited the appellant as heir at law, was expressly revocable in its nature at any period of the granter's life *et' etiam articulo mortis*. This power to alter and revoke was fully exercised by the subsequent deeds 1793, whereby he revokes, in the most express terms, the deed executed by him in 1771, and declares the same to be void and null, in so far as it conveyed the estates therein mentioned. In this situation, matters were placed on the precise footing as if no such deed had ever been executed ; and the moment this was effected, the only obstacles that stood between the appellant and these estates, were the deeds 1793 now under reduction. The deed 1771 being revoked, and declared null and void ; and the deed 1793 being reducible on the head of deathbed, the heir's right is unquestionable. The deathbed deed may subsist and be effectual as a revocation, although it be bad as a conveyance of the estate on deathbed, the more especially so, since the exercise of that power was only in compliance with an express right reserved in a deed *liege poustie*, to which the law of deathbed does not and cannot apply. Nor is it any answer to this to say, that by holding it so, the appellant would be approbating and reprobating the same deed, because the revocation of a deed *mortis causa* in favour of a stranger, and the conveying or burdening real estate upon deathbed, to the prejudice and injury of the heir, are altogether two distinct things ; and their effect regulated by different principles. The law of deathbed is a restraint imposed *in favour of the heir*, but while every thing done *in lecto* to his prejudice is liable to challenge, the ancestor is in other respects at full liberty ; and therefore an heir may set aside any act prejudicial to his interest done by his ancestor on deathbed, and at the same time avail himself of acts that are beneficial to him, though done under the same circumstances ; and in questions of this sort, it is of no consequence whether the different acts of the ancestor are done by one or by separate writings. It is evident then that the rule in equity of ap-

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1799. probate and reprobate does not apply to the circumstances of this case ; but only applies where one challenges one part of a deed and seeks to take by another part of the same deed, which is not the case in the present instance. The revocation of the deed 1771 is entirely separate from the conveyance of the estates of new, and to a different party, by the same deed. The former was a good revocation, because the granter had reserved power expressly to revoke at any time during his life, and even on deathbed. The latter he had also power to execute ; only, in executing that conveyance, it behoved the granter to do it at a period when he could competently execute it, and not on deathbed. While, therefore, the appellant has no right and interest to challenge the revocation, and while, in point of fact and law that revocation is not void, or voidable at the instance of any party whatever, yet the conveyance of the estate is quite separable from the revocation of the former deed, and open to challenge by the heir at law, because the deed 1771 being revoked, there is nothing between the heir at law and the estate but the deathbed deed ; and the latter being bad, the appellant's right to the estate is indisputable. 2. But then the respondent contends that the revocation clause is qualified, that it did not absolutely annul the deed 1771 : but revoked it only *ad certum effectum* ; declaring that it should be valid and sufficient to the extent of the powers therein reserved to Colonel Crauford to revoke and alter the same, to the effect of making the deed 1793 effectual in favour of Mr. Coutts. The question, therefore, is, whether this qualification of the powers reserved to revoke, can have any effect in supporting the disposition to Mr. Coutts of 1793 against the appellant's challenge upon the head of deathbed ? The appellant apprehends the qualification can have no effect whatever. The deed of 1771, as well as all other deeds of a testamentary nature previously executed by Colonel Crauford are revoked, and declared null and void, in so far as they are conceived in favour of the persons to whom they were granted ; *but to be valid and sufficient* to the extent of the power therein reserved to him to revoke, “ to the effect “ of making these presents (i. e. deed 1793) effectual in favour “ of the said Thomas Coutts and his foresaids.” All, therefore, was annulled except the revoking clause itself ; and to give effect to the deathbed deed, because the maker, by a previous *liege poustie* deed, had reserved power to alter at

any time during life, would be in effect annulling the law of 1799. deathbed altogether; for to hold such a doctrine would be to say, that a party may, by a written instrument, executed formally in *liege poustie* declare, "I mean that my heir at law shall *not* take my estate. I reserve to myself power to give it away upon deathbed;" and then, by a deathbed deed, to give it away so that such deed would be effectual against the heir at law. Such a proposition is quite untenable in law.

Pleaded for the Respondents.—The plea of deathbed is one in favour of the heir at law; but, in availing himself of it, it must be established not only that the deed which he challenges on the head of deathbed is a deathbed deed, but also that he has an interest to challenge it, and that it is to his prejudice. To have such interest, it is necessary to show, that but for the deathbed deed conveying the estate to a stranger, he would have been entitled to succeed to the estate. In the present case, however, no such interest exists in the appellant Mrs. Crauford or Howieson, because, even if the deathbed deed were set aside, she could not take the estates; in that case the deed of 1771 would come into operation, which disinherited her, and conveyed the estates in favour of Sir Hew Crauford. The *liege poustie* deed of entail of 1771, as a subsisting and uncanceled deed, totally excludes all right in the heir at law, and therefore bars all challenge in so far as she is concerned. She has therefore no interest, and cannot be heard to say, that the deeds 1793 made her situation either better or worse. It took the right of succession not away from her, but only from Sir Hew Crauford, and other substitutes in the heir of tailzie 1771, so that her right was not prejudiced any more than it was before that deed was executed. She has therefore no right to complain, and no interest to challenge or set the deed of 1793 aside. Nor is it any answer to this to say, that the terminating destination in the deed 1771 to the heirs whatsoever of the granter is sufficient to support her interest, because that interest could only entitle her to challenge the revocation to the effect of maintaining the deed, and destination of the estate in favour of Sir Hew Crauford and other substitutes, in order that she may succeed under the deed when they shall all have failed; whereas the object of the present action is to have her immediate right to the estate declared. But it is quite clear in law that the deed 1793 was a good deed, which the granter had power to execute, and which by the deed 1771

1799. he had expressly reserved power to execute even on deathbed. The deed, on these two grounds, 1. On the want of interest in the heir, the deed not being to his prejudice; and, 2. In consequence of the express powers reserved to alter and revoke at any time during his life and on deathbed, is a deed to which the law of deathbed cannot apply. It is admitted by the respondents that where a person executes a deed in *liege poustie* in favour of his heir *alioqui successurus*, with a reserved power to alter, and he alters it on deathbed to the prejudice of such heir, the heir may reduce it, because he may repudiate the former deed altogether, and take the estate, not as *hæres factus*, but as heir at law. But where the heir shall found upon and take benefit by the first deed, he must do so under all its conditions. The heir cannot approbate and reprobate the same deed. If, therefore, the appellant challenges the deed 1793 on deathbed, in her character as heir at law, then she cannot succeed, because that deed is not to her prejudice. It is only to the prejudice of the party in whose favour the destination of the estate was previously settled by the deed 1771. And, accordingly, had the deed 1793 never existed she could not have succeeded. The effect, therefore, of challenging this deed on deathbed, assuming it to be challengeable on that head, is not to benefit the heir at law, but the stranger donee under the 1771, by which that heir at law was disinherited. And it will not do to elude this consequence of her challenge, by attempting to show that the revocation clause in the deed 1793 is separable and distinct from the disposition therein of the estates, because this proposition cannot hold, unless it can be shown that the disposition is subsequent to the revocation, and the latter deed separate and distinct from the former. In the present case, the revocation and the disposition and settlement of the granter are one and the same united act. This argument, which the appellant uses with the view of showing that the moment the deed containing the power to alter is annulled, that power is lost, and the heir at law's right revives, so as to entitle her to challenge the conveyance of the estate in that same deed. But this doctrine can only apply to two distinct acts, and where the disposition follows the revocation in separate deeds. And this argument is excluded by the nature of the revocation in the deathbed deed. This revocation is qualified. The deed 1771 is not revoked absolutely, but only *ad certum effectum*, declaring that notwithstanding

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ing the revocation of it, that deed should stand *valid and sufficient to the extent of the powers therein reserved* to alter the same, to the effect of making the deed 1793 effectual to the respondent Mr. Coutts, in favour of whom it was granted. So that at all points the heir at law is excluded in her challenge, whether the revocation be held qualified or not; or whether the deed 1793 were to be set aside on deathbed or not. She cannot approbate and reprobate the same deed.

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After hearing counsel,

The LORD CHANCELLOR LOUGHBOROUGH said,

“ My Lords,

“ The hearing at the bar upon this cause was had some time ago, and I have now to state the result of the opinion I have formed upon it. The more I have considered this case, the more I have felt the difficulty and importance of it. I had the advantage of trying my own opinion by communication with persons conversant in the law of Scotland, who were present at the hearing; with a noble and learned Lord (Lord Thurlow) who perused the printed cases, and with a Judge of the Court of Session, who was not raised to the bench when the judgment now appealed from was pronounced. I had verbal communication also with other parties, and I was favoured with the result of the opinions they had formed.

“ These opinions were not uniform; if they had all gone in one course, I should have deemed *that* the safe mode for your Lordships to have followed, in determining this cause, though it had differed from my own sentiments. It is proper to state that the learned Lord I alluded to, concurs with me, and that our opinion is, that the judgment in the present case is contrary to law. At the same time, he feels, as I myself do, much difficulty in a question purely of Scots law, upon such opinions as we can form, to state it as advisable to reverse the judgment of the Court of Session.

“ I shall mention, in a few words, the nature of the present question, to show the importance of it, the grounds upon which the decision proceeded, and the nature of my doubts with regard to it; and I shall then submit what I conceive is proper to be done in the present case.

“ The facts in the cause are short. Colonel Crawford possessed an estate, which he destined by deed, several years ago, to Sir Hew Crawford, who was not his heir. This deed remained in Colonel Crawford's hands undelivered; but if he had died without executing any other deed, no doubt the estate would have gone to Sir Hew. He reserved a power, however, to alter the deed in whole or in part, *et etiam in articulo mortis*.

“ This reservation referred to a point in the ancient law of Scotland, which I have always looked up to as of great excellence, and I

1799. have read cases where it was treated with great respect by Lord Hardwicke. By it no deed is valid against the heir, if executed on *death-bed*, that is, if the granter be attacked with the sickness of which he dies, and does not survive a certain number of days. In the argument stated in the printed cases, it was held out, that this was a personal privilege in favour of the heir at law, a regulation for his benefit alone. But, in my opinion, this comes far short of the excellence of the regulation; it is also highly favourable to the dying man that his last moments shall not be disquieted. It was perhaps at first intended to put a stop to the granting legacies to the church and to charities, which prevailed so much in those days. It now prevents the mischief that might arise from deeds obtained by besieging a person when near his death.

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“ The heir has a right to set aside all deeds executed contrary to this regulation. It appears, in the present case, that Colonel Crauford entertained a purpose that Sir Hew Crauford, in whose favour he had made the former deed, should not succeed to his estate; and that he also had the intention, when in a declining state of health, to leave it to a very respectable gentleman, an old and intimate friend, perhaps his relation. By him it was neither asked nor expected; and when I mention that this was Mr. Coutts, the respondent in the present appeal, I need not add, that he could be supposed to want it but little. Without communication with Mr. Coutts, he revoked the disposition in favour of Sir Hew, and by the same deed conveyed one of his estates to the former.

“ A singular transaction took place with regard to another estate, which he meant to give to Mr. Coutts, by means of a fictitious sale, for £4000 or £5000. He writes that gentleman a letter, mentioning that he had sold him the estate, and would give him a receipt for the price; but payment was still to be supposed, and he desired Mr. Coutts to send him a bond for the money. This transaction makes no part of the present appeal.

“ After Colonel Crauford's death, the appellant, his heir at law, claimed his estates, if no person could show a better right to them. For this purpose, she brought an action before the Court of Session, for setting aside the disposition to Mr. Coutts as void, being granted on deathbed, and contending that the pretended sale of the other estate was invalid, being a mere fiction. She called Mr. Coutts and Sir Hew Crauford as parties. But the latter was entirely out of the case; the only title he could make was through the deed which had been revoked. He, however, founded upon this, that it was the intention of the deceased that he should take the estate, if it did not go to Mr. Coutts. But the deed in his favour was revoked in the most marked manner, and all intention as to him was clearly gone. When the question was agitated with regard to the estate which was the subject of the fictitious sale, Sir Hew having stated his argument, that if his deed was not revoked, that estate must be-

long to him, the Court found that the heir was entitled to it, the deed to Sir Hew being expressly revoked. 1799.

"That determination was posterior to the decision which forms the subject of the present appeal on the other part of the cause, and Sir Hew's argument in some degree arose out of that decision. The Court then held the ground of giving the estate to Mr. Coutts, by some confused mode of reasoning, to be of this nature:—"It is true an heir at law has a right to set aside deeds executed on deathbed, but what right have you in the present case? Sir Hew must take in preference to you, though his deed was revoked, it was a revocation only to the purpose of validating the deed in Mr. Coutts' favour. Sir Hew is a bar to you; but as the *intention* of the deed ceased was not in his favour, therefore Mr. Coutts' right is good against him."

"The Court then added a good deal of reasoning upon the decisions which had been pronounced. In one of these, about five and twenty years ago, there occurred a case, where a person possessed of two estates A. and B; by one deed he conveyed both estates to certain disponees; and by a second deed, executed on deathbed, he conveyed the second estate B, to certain other persons. Lord Auchinleck, a respectable judge, before whom this matter was first argued, held, that the heir at law was entitled to the estate B, and that the deathbed deed, though ineffectual as a conveyance, was sufficient as an implied revocation of the former deed with regard to that estate. This judgment was altered by the Court upon an appeal to them, and it was determined that the deathbed deed was effectual, on this ground, that the heir was cut off by the first deed, of which there was no express, but merely an implied revocation by the subsequent disposition of the estate B on deathbed; and that if the deathbed deed was not to subsist, the prior deed would be effectual. The Court of Session here made a distinction between an *express* revocation and an implied one, which I confess I do not feel. If a person makes a disposition of his estate, and locks it up in his repositories, and, at the distance of ten years, makes another disposition of the same estate, I should be of opinion that the former undelivered deed was revoked, and that the posterior one must take effect.

"Another distinction was taken in the present case, namely, that though Colonel Crauford, being on deathbed, could not execute a valid disposition of his estate, yet he could still execute the reserved power to alter contained in his former deed, and which he had charged on Sir Hew Crauford the volunteer. My objections to this is, that such a reservation cannot be allowed: A man may reserve a power to change his disponee, whose sole right being founded on the disposition, he cannot object to any part of it. But what is the nature of the reservation made by Colonel Crauford?—It is a reservation of a power to do on deathbed what the law says he shall

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1799. not do in that situation. He might reserve a power to alter his former disposition at any time of his life, which was a reservation against the disponent; but he could not reserve a power against the heir at law to do a deed which was contrary to law.

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"I may illustrate this, by mentioning an instance where Lord Hardwicke determined a similar question upon a similar point of law. A person conveyed her estate to her daughter, an infant, with power to dispose of the same during her minority, or to devise it by will for certain purposes. The daughter was a grown infant, and was under coverture. After the mother's death, the infant's husband got her to grant a conveyance to his creditors, which was a different purpose from those pointed out by the mother. The daughter afterwards devised her estate by will, and died before the age of twenty-one years. It was contended in this case, that though the daughter was an infant, yet what she did in execution of the power granted by the mother, must be held valid. Lord Hardwicke appears to have been at first caught with the argument; but he was afterwards clear, that the powers mentioned in the mother's conveyance were contrary to law, and though an infant of twenty years had a greater capacity of mind than one of tender years, yet by law they were under the same disabilities. The same mode of reasoning applies to the case now before us.

"It appears that the judgment of the Court below must have proceeded on a fallacy. The deed in favour of Mr. Coutts being executed on deathbed was a nullity; the deed in favour of Sir Hew was also a nullity, because it was revoked both expressly and by implication. But the Court, in some singular way, by splicing these two nullities together, which, taken singly, were of no effect, formed a deed carrying off the estate from the heir, though against a positive law.

"The respondent founded part of his argument upon what is termed in Scots law the maxim of *approve and reprobate*. Says Mr Coutts, "if you approve the revocation of the deed to Sir Hew, contained in the posterior deed in my favour, then you cannot reprobate the other claims of that deed." But this is false reasoning; the Court cannot say to the heir at law under what deed do you claim? It is enough for her to say, God and nature have made me heir at law; show me by what deed my right is cut off. The title of an heir at law is always complete, insomuch, that a conveyance or devise to such heir in fee is held null and of no avail. The law of England, in such a case, says the heir is in by *descent* and not by *purchase*.

"Having stated so much of the argument in the present case. I must now mention the doubts that has occurred to me upon the subject. I cannot concur in the judgment which has been pronounced; and if I had been sitting as sole judge in a court of law, bound to

act according to the dictates of my conscience, I must have determined against the judgment of the Court below. But the case is different here; when I am to state what I conceive is fit to be done, I cannot arrogantly desire that my opinion should be held better than that of the Court of Session; and, on a point of Scots law of great importance to the public, assert that they have been mistaken.

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"A matter which I have yet to mention, appears to have biassed the Court considerably. Within these last twenty-five or thirty years, an attempt has been made to remedy an inconvenience in conveyancing, which was a good deal felt. In Scotland every security on real estate is itself real. Persons in this country having money to lend, are informed that the titles to estates in Scotland are clear, and that interest is there well paid; but they are staggered when they learn that they cannot dispose of such securities by will. A desire at first prevailed to have this matter settled by act of Parliament, but it was not effected. The present Lord President of the Court of Session, and the late Lord Justice Clerk, who was eminent for his knowledge in conveyancing, thought they could do away this difficulty, and still make a good security, by creating a trust, and so reserving a power to devise by will. I am apprehensive that the decision in this case would involve questions relative to the securities so vested in trustees; and, therefore, I feel the more delicacy with regard to it, where the consequences might be so widely extended, and so disagreeable.

"I have considered this point along with the noble and learned Lord already alluded to, and we agree in opinion, that it should be regulated by an act of Parliament, declaring that money secured on real estates should still be considered, and be devisable as money, though descendible to the heirs at law, as in mortgages in fee in this country.

"Upon the whole, my opinion is, that the case should be remitted to the Court of Session, with a direction to them to reconsider their judgment. I think a future consideration of it may open and enlarge the views of the Court; for, upon a part of the cause, subsequent to that now appealed from, they preferred the heir at law, and they must then have entertained an idea of the case which was not consistent with their former decision."

It was accordingly

Ordered and adjudged that the cause be remitted to the Court of Session, with a direction to re-hear the parties upon the interlocutors complained of.

For the Appellants, *R. Dundas, W. Grant, Ad. Rolland, Rob. Craigie.*

For the Respondents, *T. Erskine, Wm. Adam, Henry Erskine.*

1800.
 ——— JAMES DONALDSON, *Appellant* ;
 DONALDSON v. JAMES LORD PERTH, *Respondent*.
 LORD PERTH.

House of Lords, 3d February 1800.

DEFAMATION—CHARACTER—FACTOR.—Circumstances in which an action of damages brought by a factor and steward, against his late employer for injurious expressions, tending to impeach him with neglect, maleadministration, and dishonesty in his office, not being proved was dismissed, and the defence, in justification of what was said as to his conduct, sustained.

The appellant had acted in the capacity of factor and steward on the estates of Lord Perth, and it was alleged by him that this situation, from various causes, having become disagreeable, he was compelled to resign it : and that sometime thereafter he was obliged to raise the present action of damages against Lord Perth, setting forth the following circumstances :—That Lord Perth had conceived an inveterate ill will against him, and, actuated by this feeling, did his utmost to ruin his character, and to prevent him obtaining the employment of others, by accusing him to various persons, and in the most public manner, of maleadministration, negligence, and dishonesty, using the most injurious epithets when speaking of him. Further, that with a view of completely blasting the appellant's credit and reputation, he thought proper to make oath before a magistrato that the appellant was indebted to him in a large sum, and on the representation that he intended to withdraw himself from the kingdom, he obtained a fugæ warrant, and was taken to prison, in consequence of all which proceedings he lost a valuable situation as factor on the estates of Mr. Maul, his credit and reputation being injured thereby.

In defence, the respondent stated, “ that the defender had “ good reason to complain of the pursuer, in place of having “ afforded any just cause of complaint to him. And that the “ application to the sheriff, and subsequent steps, were rendered necessary, and fully warranted by his own conduct ; “ nor had the defender spoken of the pursuer in any other “ terms than what the occasion required, and his conduct “ merited.”

A proof was allowed. One witness, who was asked whether “ he ever heard the defender say that the pursuer had “ acted dishonestly by him, or rascally, or used such expressions

sions respecting Mr. Donaldson. Deponed, that he never heard Mr. Drummond say that the pursuer had behaved dishonestly or rascally; but he heard him use warm expressions to that purpose; and he heard him express himself in this manner on different occasions, and in different companies; but he cannot recollect the particular words."—Another witness being asked, "If he ever heard Mr. Drummond say that Mr. Donaldson had let the farm of Cargill to Mr. Ducat at an undervalue, and had received from Mr. Ducat some consideration to himself for so doing? Depones, that he heard Mr. Drummond say that the farm had been let greatly under value, and that Mr. Donaldson's conduct in that respect was very unaccountable, or words to that purpose; but he never heard him throw out the insinuations above mentioned." Also being interrogated, Depones "that he heard Mr. Drummond say, on several occasions, that the pursuer, in various instances, did not manage his affairs in the way that he expected. That the things which Mr. Drummond found fault with, were the setting of the farm of Cargill, as already mentioned, Mr. Donaldson laying out unnecessary sums about Pitkellony, and his drawing money from the Stirling bank, and his not laying it out at the time, and in the manner Mr. Drummond expected; and on none of these occasions did Mr. Drummond say that the pursuer had acted dishonestly, but that his conduct was exceeding suspicious and improper." Another witness (Sir Wm. Murray), deponed, "That he heard Mr. Drummond say that the pursuer was a man whom the deponent ought not to have any connection with, or recommend to any person as a factor. He cannot recollect the expressions, but they were strong, and he appeared to be warm when he uttered them; and the deponent understood from Mr. Drummond's expressions, that he considered the pursuer to have acted dishonestly in that matter."—"That he heard the pursuer say that it was believed in the neighbourhood of Cargill that the pursuer owed an account to Charles Ducat for butcher meat, and that the account had been settled by means of that bargain, and that Mr. Drummond concluded that either he must have got some consideration for letting the farm at an undervalue, or that he was not fit to be employed in the management of an estate, if he could be so grossly mistaken."

In regard to the *meditationes fugæ* warrant, it came out in proof that he had left his appointment with a large balance

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1800. in his hands, and there were some bills and a bond about
 — which he had to account. He was written to for the
 DONALDSON balance by Lord Perth's agent, and also for the vouchers of
 v. his accounts, and no satisfactory answer was given.

LORD PERTH. The Court pronounced this interlocutor. "The Lords
 July 8, 1794. "having advised the state of the process of damages at the
 "instance of James Donaldson, sometime factor to James
 "Drummond, Esq. of Perth, against the said *James Drum-*
 "mond, his constituent; testimonies of the witnesses ad-
 "duced, and writs produced, both in the said state and the
 "appendix relative thereto; and heard parties' procurators
 "thereon, in their own presence, sustain the defence, and
 "assoilzie the defender from the whole conclusions of the
 "action, and decern." On reclaiming petition the Court

Jan. 26, 1796. adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. When the appellant engaged in the respondent's service, he enjoyed an unblemished character and reputation for honesty and ability in his profession, and was so esteemed by the most respectable gentlemen in the county, which is established by many parts of the proof. The nature of the appellant's employment, that of steward, is such, that even a suspicion excited, may generally be fatal and ruinous. From the heavy responsibility which attaches in the management of a great estate, great ability, as well as probity, and high character, is indispensable; and, consequently, to call the abilities of such a man in question, is an injury of the deepest kind, and to cast an imputation on his integrity is equally destructive and fatal, where his office is a situation of trust and confidence. The respondent not only aspersed the appellant's character to third parties in general conversation, where he was not called on or bound to allude to the subject; but also to those persons to whom he had occasion to state his opinion; and the tenor of these expressions, as established by the proof, was to impeach the appellant's honesty and fair dealing. In addition to these, and as still farther tending to ruin and damage the appellant's character, credit, and reputation, he had alleged he was about to abscond for debt, and had, under this pretext, obtained a fugæ warrant, and had him imprisoned; by all which he had lost a situation as factor on Mr. Maule's estates, and had suffered loss and injury otherwise. Nor is it any answer to this to say, that this situation was lost on account of not being able to find security for his

intromissions, because inability to find security was just a part of the injurious consequences which flowed from the respondent's attacks on his character and credit. Had the appellant taken a bribe for letting the respondent's farm of Cargill below its value, there might have been some probable cause, and some vestige of justification for these calumnies; but as there is no evidence whatever of this, the respondent is liable in damages. 2. He is separately liable in damages, for an unwarrantable and most oppressive execution of the warrant as in *meditatione fugæ*; because, in resorting to this diligence, he had no reasonable ground, and no probable cause to believe that the appellant was about to leave the country. Such a step is not to be taken without the strongest proofs and grounds of belief. Such a warrant charges the person, against whom it is issued, with fraud and dishonesty towards his just and lawful creditors; and, therefore, he who applies for it, obtains it at his peril. Law has justly laid down, that a person who rashly and without cause, applies for a warrant against his alleged debtor, as in *meditatione fugæ*, will be subjected in damages, if upon investigation it shall appear that no suspicion of the kind prevailed. His own belief, however strong, will not protect him from reparation. He must show not only that he believed, but that he had *good grounds for believing*. It is true, nothing but caution *judicio sisti* is demanded: but the step is injurious, as the proceedings are at once an attack on *credit*, character, and reputation. The respondent had not the least probable cause, and did not assign any reasonable ground of belief for the proceedings thus so harshly adopted, and so inhumanely put into execution.

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Stair, B. iv.
tit. 47, § 23.
Bankton, B. i.
tit. 23, § 37.
Ersk. B. i.
tit. 2, § 21.

Pleaded for the Respondent.—1. In order to constitute a charge of defamation, it must be shown that a person has industriously and *animo injuriandi* propagated reports to the prejudice of another; whereas it appears from the proof taken in this case, that so far from circulating such reports to the world at large, the respondent only expressed a just indignation at the appellant's conduct to his own intimate acquaintances, some of whom had all along interested themselves in the appellant's welfare, and to those who had both a right and interest to make enquiries regarding him. 2. In the *meditatione fugæ* warrant against the appellant, the respondent proceeded upon such reasonable grounds of belief as are held sufficient in law to justify such a step and to support the warrant; and the warrant was executed in as mild

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a manner as possible, consistently with the circumstances ; and there is no law that prevents a creditor from resorting to such a diligence, while he is at the same time taking measures for attaching his effects ; and the respondent cannot be charged with proceeding illegally or oppressively on this account.

After hearing counsel,

LORD ELDON said,

“ My Lords,

“ Some of the circumstances in the present case appear to have been so hard upon the appellant, that I almost wish I could perceive some reasonable ground on which to reverse the judgment pronounced against him by the Court below. But, much as I disapprove the circumstances of the arrest, it does not appear to me that the judgment can be reversed, without imputing to the respondent a malicious disposition towards the appellant, which is neither to be inferred from the evidence in the cause, nor presumed from what usually takes place among mankind in cases of a like nature.

“ The judgment was unanimous against the appellant. The cause consists of two branches, the one relative to an alleged defamation on the part of the respondent, and the other relative to his oath, on which the appellant was arrested. When it is insisted on the part of the appellant, that what the respondent stated to Sir William Murray and others, on the subject of the lease of the farm of Cargill, and what he swore in his oath upon which the arrest proceeded, were consequences of a wicked heart and a malicious disposition towards the appellant, it is in my mind not an unimportant fact in the cause, that the Court below has unanimously held the contrary opinion.

“ One of your Lordships correctly intimated, that the defamation must be confined to the farm of Cargill, as that alone was specified in the condescence. Other general allegations of defamations were suggested, but in so vague a manner, that the respondent could not possibly have made any defence to them. Let us therefore see how the fact stands with regard to the farm of Cargill.

“ You will recollect that Sir William Murray was the appellant’s friend, and introduced him to the respondent ; it appears to me that his evidence is most material in favour of the respondent upon this point. It turns out from Sir William’s deposition, that he also had heard surmises in the county relative to the appellant’s conduct as to the farm of Cargill ; and this matter does not rest on the depositions of Bannerman the farmer, or Bannerman the minister, or of Fenwick, as the appellant contended. And Sir William Murray says, he cannot recollect that Lord Perth mentioned this subject to him in the hearing of any third party, but once, and that was in

the hearing of Sir William's son. Every thing suggested against the respondent upon this point, is stated to have taken place in conversation only. From the whole evidence, it appears that an opinion did prevail in the county, that the appellant had been guilty of misconduct with regard to this farm of Cargill, that Lord Perth believed this opinion to be well founded, and stated as much in conversation to Sir William Murray and others. But this is not sufficient to support the appellant on the subject of the defamation; he ought to have shown that no such general opinion prevailed, but that Lord Perth had, without reason, maliciously, and from the dictates of a bad heart, defamed the appellant.

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"The other part of the cause relates to the arrest. The law on this subject is correctly stated in one of the reasons to the appellant's Reason 2d. case. (His Lordship read part of this.) "His own belief that the debtor intended to fly, however strong, will not protect him from making reparation. He must show, not only that he believed, but that he had good grounds for believing." By this I understand, that if the conclusion of the respondent's mind was not such a conclusion as might be drawn by honourable men from similar circumstances, he ought to be answerable in damages.

"In the present case, you will recollect that the following circumstances did obtain: When it was settled, that the appellant was to leave Lord Perth, it appears, by his own admission, that he had a balance of Lord Perth's cash in his hands, to the amount of £500 or £600, out of which he claimed a deduction of about £67. He had also certain bills to the amount of £400 or £500, which he had taken for the sale of part of Lord Perth's property. And there was, besides, a bond to the bank, in which, though Lord Perth was not a principal, yet he was cautioner for the appellant; and this money was intended for Lord Perth's use. Most part of this money had been drawn on by the appellant.

"When the relation between the parties was to cease, a circumstance strikes me as material, from which to infer, whether or not the appellant would stand by the judgment of his country.—Mr. Lumsdaine, the respondent's agent, calls for the appellant's vouchers, and for the balance in his hands. Granting that it was wrong to call for the vouchers; ought not the appellant to have proposed to pay, or lodge the balance in his hands? It is odd, that he is also silent with regard to the bond granted to the bank. Lumsdaine repeats his demand on these subjects in the most pressing manner; and you will recollect, in the appellant's short letter to Mr. Lumsdaine, he says not a syllable on these points, but mentions that he was going to the east country.

"Was not this a circumstance sufficient to raise suspicions in the mind of any person whatever? Mr. Maule's commissioners state, that what first alarmed them, was, that the appellant neither paid

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nor lodged the balance when demanded of him, and that they thought little of the arrest. How was it then that the appellant was disappointed of Mr. Maule's employment? I say, it was owing to his own fault. Mr. Guthrie, one of Mr. Maule's commissioners, states that the arrest made no impression upon them, but that they were struck with the appellant's conduct with regard to the balances.

"But Lord Perth was not answerable for these matters being conveyed to Mr. Maule's commissioners. It appears from the evidence of Sir William Murray, that he thought it his duty to communicate to Mr. Maule's commissioners the reflections made on Mr. Donaldson's character; and to do this he had no authority from Lord Perth.

"The butler's letter has been much observed on by the appellant. I do not say that it, of itself, was sufficient evidence on which to found the affidavit, in any other view than as it related to a person who had conducted himself, in the manner I have mentioned, with regard to the balances. It stated the *general* opinion to be, that the appellant might leave the country. The butler, on his examination, says, he learnt this opinion from one Thomson; Why then was not Thomson asked where he got this information? The only answer to this is, that the appellant would not allow Thomson to be examined.

"From all these taken together, the non-payment or lodging of the balances, (which are not yet paid); the appellant's silence with regard to the bank bond, and the general opinion, as stated by the butler;—can it be said that the respondent could not be of opinion that the appellant might get out of the reach of justice? No, says the appellant, the respondent knew I was engaged to Mr. Maule; but it does not appear that Lord Perth at that time knew this: And Mr. Guthrie says, that the appellant's engagement with Mr. Maule was not prevented by the arrest, but by his non-payment of the balances.

"I am therefore of opinion, that it is unsafe that your Lordships should say, that this arrest proceeded from the workings of a bad heart; and that you cannot reverse the judgment of the Court below on any ground which has been insisted on by the appellant.

"I therefore move that the interlocutors appealed from should be affirmed."

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For the Appellant, *Henry Erskine, C. Hope.*

For the Respondent, *R. Dundas, Robert Blair, Arc. Campbell, ju-*

(M. 7471.)

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THE REV. DOCTOR MICHAEL M'CULLOCH, }
Minister of the Gospel in the Parish of } *Appellant;*
Bothwell, - - - - - }
WILLIAM ALLAN, Schoolmaster of Bothwell, }
COLONEL JOHN HAMILTON of Motherwell, }
The Right Honourable WILLIAM LORD } *Respondents.*
BELHAVEN, JAMES CUNNISON, Esq. of }
Jerviston, JAMES HAMILTON, Esq. of }
Holmhead, and other Heritors of the }
Parish of Bothwell, - - - - - }

House of Lords, 18th Feb. 1800.

JURISDICTION—SCHOOLMASTER.—In the appointment of a parish schoolmaster, the minister of the parish dissented to the election of the person appointed by the other heritors. He repeated his objections before the presbytery, who is appointed by act of Parliament to take trial of his fitness and qualifications for the office. These objections being over-ruled, the minister appealed to the Synod, and the schoolmaster brought an advocacy to the Court of Session. The Synod unanimously reversed the sentence of the presbytery, notwithstanding the sist had been intimated to them, whereupon the schoolmaster also tendered a petition and complaint, and the whole question of jurisdiction was discussed under the following heads; 1st. Whether the sentence of the presbytery was final? 2d. Whether, if not final, the appeal lay to the Synod, and other higher Ecclesiastical Court? or, 3d. Whether the appeal was to the Court of Session? Held the review to be in the Court of Session; Reversed in the House of Lords, and the interlocutor affirmed, remitting the cause to the presbytery, with an opinion expressed, that it was not the province of the Court of Session, but of the higher ecclesiastical courts to say, whether the sentence of the presbytery was final or not.

Under the act 1696, c. 26, the right of electing parochial schoolmasters is vested in the heritors and minister of the parish; but the person so elected has no right to enter upon the exercise of his office, nor is he entitled to draw the salary, or enjoy any of the civil emoluments of it, until the presbytery of the bounds has taken trial of the sufficiency and qualifications for the proper discharge of the duties of that office which he has been chosen to fill.

William Allan, the respondent, was elected by the heritors schoolmaster of the parish of Bothwell; but the minis-

1800. ter of the parish not being satisfied with his qualifications, dissented, and stated his objections at the meeting on the day of election. These objections were overruled by a majority of the heritors present. Mr. Allan then went before the presbytery, in terms of the act, to undergo his trials of his qualification for the office into which he had been elected. Dr. M'Culloch again renewed his objections before the presbytery as to Allan's qualifications, but these being overruled, Mr. Allan was found duly qualified. The appellant protested, and appealed to the next synod, or church court. This appeal being allowed and recorded, the respondent Allan presented a bill of advocation to the Court of Session, in which he obtained a sist. The bill was passed, and ultimately discussed before the Lord Justice Clerk as Ordinary.

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In the meantime, the Synod of Glasgow and Ayr, although the sist was intimated to them, considering that this sist could only apply to the civil right of election, proceeded to take up the appeal from the presbytery of Hamilton; after considering which, they unanimously reversed the sentence complained of, and declared Mr. Allan not qualified. Whereupon he presented a petition and complaint to the Court of Session, complaining of the synod as a body, and of the appellant as an individual, for having been guilty of a contempt of authority, by proceeding to take cognizance of these appeals notwithstanding the sist in the bill of advocation. The Court dismissed the petition and complaint in so far as regarded the synod; but it was remitted in so far as concerned Mr. M'Culloch, the objector, to the process of advocation depending before the Lord Justice Clerk, before whom the general question of jurisdiction of the Court of Session was to be discussed, to try, 1st. How far these proceedings of the presbytery were final? or, 2d. If an appeal was competent from their sentence, Whether it was to the superior ecclesiastical judicatories alone? or, 3d. To the Court of Session?

The appellant maintained that the proceedings of presbyteries, in taking trial of the qualifications of schoolmasters, under the act 1693, c. 22, were only reviewable by the superior ecclesiastical courts. All presbyteries, according to the constitution of the Church of Scotland, were courts whose sentences were in no case final; and, when reviewed, the only court competent to review their sentences, was the superior ecclesiastical tribunal. To suppose that the sen-

tence of the presbytery could be final, would be to suppose that it had within itself a supreme jurisdiction. By the particular schoolmasters' act, it has no such final jurisdiction. By the constitution of the church, which exhibits a regular and gradual subordination, from kirk-sessions to presbyteries, from presbyteries to provincial synods, and from provincial synods to General Assemblies, the right of review lies from all subordinate to the higher, which leaves no final jurisdiction in the subordinate court, as is shown by the act 1592, c. 116, regulating the various jurisdictions of the church. And as by the schoolmasters' act 1693, c. 22, the power of taking the trial of the qualification of schoolmasters was declared to belong to "presbyteries of the bounds;" and as an appeal to the superior ecclesiastical courts is not thereby excluded, an appeal must lie, according to the constitution of the church, to their superior tribunals, and consequently cannot be final with the presbytery.

As therefore the power of review is not expressly excluded, and the proceedings of the presbytery not declared to be final, it follows, 2d. That an appeal lies to the superior ecclesiastical court alone, and not to the Court of Session, or any other civil court; because it would require an express enactment to make the proceedings of a court, with known and established powers, subject in one instance to review in a different court, which had no superior jurisdiction in regard to it in ordinary cases. And, on these grounds, the presumption of law is, that the appeal must go from the presbytery to the synod.

By the respondent it was answered, 1st. That the powers of presbyteries in taking trial of the qualifications of schoolmasters, was not part of their proper ecclesiastical jurisdiction, conferred upon them by the laws of the church; but only a statutory jurisdiction conferred on them by the legislature, as parliamentary commissioners, employed to exercise certain ministerial powers; and, consequently, this being the origin of their powers, and these being civil in their nature, as connected with the election of a schoolmaster, which was a civil act, and the schoolmaster not an ecclesiastical person, the right of review lay from the presbytery to the Court of Session, and consequently the Court of Session had proper jurisdiction in the matter.

The Lord Justice Clerk (M^cQueen) reported the case to the Court.

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1800. And the Court pronounced this interlocutor:—" Upon
 M'CULLOCH " the report of Lord Justice Clerk, and having advised the
 v. " informations for the parties, the Lords, in the advocacy,
 ALLAN, &c. " remit the cause simpliciter; and in the petition and com-
 May 25, 1792. " plaint, assoilzie the defender, and dismiss the petition and
 " complaint, and decern."*
 On reclaiming petition the Court ordered memorials; and
 thereafter, on considering these, the Court altered " the in-
 May 21, 1793. " terlocutor reclaimed against; find that the sentence of
 " the presbytery is not final, but that the power of review
 " lies in this Court, and not in the supreme church judica-
 " tories; and therefore advocate the cause, and remit to the
 Nov. 28, — " Lord Ordinary to proceed accordingly." On reclaiming
 petition the Court adhered.

* Opinions of the Judges.—(Interlocutor 25th May 1792.)

LORD PRESIDENT CAMPBELL.—" This is a question of jurisdiction with respect to the qualification and admission of a schoolmaster.

" Three opinions have been entertained. First, that the sentence of the presbytery is final. 2d. That the review is in the Court of Session. 3d. That it is in the superior church courts.

" 1st. Point. This is the most important of any. The proposition is adverse to the fundamental principles of the constitution. No inferior judicature in this country is final, unless it be so declared by statute. Even the supreme Courts of Session and Exchequer, and Commission of Teinds, are subject to appeal to the House of Lords. As to the last instance, see Decisions 1781, &c., case of Kirkden, (ante vol. II. p. 621.)

" In all civil matters, the Court of Session has a supreme controlling power, and, laying special statute aside, no injustice or wrong can take place, nor any grievance be stated of a civil nature, which may not in some one form or another be brought under cognizance of this Court; even those instances which must originate before other courts. And we often review acts of a ministerial nature done by public officers, without the intervention of an inferior court, properly so called, *e. g.* in the execution of legal diligence, or we stop by suspension, acts done or attempted by private individuals against law.

" It may happen that the act complained of, is the result of discretionary powers vested in certain officers, or exercised by inferior courts by statute, or at common law, which a court of superior jurisdiction, although competent, ought not to interfere with, unless the boundaries of sound and reasonable discretion have been exceeded. Thus the Court of Tithes has a discretion with respect to the

Against these interlocutors the present appeal was brought to the House of Lords. 1800.

Pleaded for the Appellant.—By the act 1693, c. 22, all schoolmasters and teachers of youth in schools, are declared

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quantum of stipends, and the Court of Session has a discretion with respect to granting protections under the bankrupt act. An appeal against any judgment of that kind would not be well received, although not incompetent. In the cases of Kirkden and Tingwall, (ante vol. III. p. 140,) the appeal was received, and certain points discussed; but the causes were remitted to reconsider circumstances. It is believed in a late instance, viz. Robertson of Banff, an appeal was attempted against an interlocutor refusing a protection, but the House of Lords thought it improper, and did not allow the cause to be heard.

"In many instances of a discretionary nature, this Court has given relief against the actings of inferior courts, magistrates, or public officers; Tailors of Edinburgh v. Journeymen Tailors, 28th July 1778, (Mor. 7623.) (Wages of Workmen); Paterson v. Magistrates of Stirling—(Regulations of Market,) 28th Feb. 1783, (Mor. 1997.) Wilson v. Magistrates of Glasgow, (Stent dues), 16th June 1759, (Mor. 12076.)

"It is still more clear that acts of a ministerial nature are subject to review; Finlay v. Magistrates of Linlithgow, (Weights and Measures,) 21st July 1782, (Mor. 7390.)

"It is equally clear that the idea of this Court, acting as Commissioners of Parliament, not being subject to review, is ill founded. The Court of Teinds is an instance of this, and Commissioners of Supply, another. Ross v. Mackenzie, 10th March 1774, (Mor. 8663.) See also the cases mentioned on p. 78 of this paper, (printed pleading lodged in Court containing the case, and quotation of authorities) about Justices of the Peace.

"The trial of a schoolmaster's qualifications is not purely ministerial, but of a judicative nature. Neither is it discretionary. What if a majority of ignorant lay elders, &c. from pique and malice, had found the pursuer disqualified, where he could prove that he was well qualified? Would there be no redress? See cases of Penpont, (Thomson); Telfer, Schoolmaster of Langholm; Schoolmaster of Kilbirny, &c.

"It is clear as to censure and deprivation, that the presbytery's (sentence) cannot be final, and no instance of the kind can be given with respect to the sentence of any subordinate court, either civil, criminal or ecclesiastical, being final, especially where the trial is without jury, and the act 1693 makes no distinction in this respect between the previous trial and the subsequent sentence.

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to be liable to the trial, judgment, and censure of the presbytery of the bounds, for their sufficiency, qualifications, and deportment in the office; and as the jurisdiction of the superior church courts is not excluded, an appeal must lie

"It may be noticed, that the extraordinary commission granted in 1690 for visitation of universities, colleges, and schools, was not at an end in 1693. Vide Act 1693, c. 41. But this was not considered as interfering with the common right of visitation which belonged to presbyteries in the case of schools, fixed by the act 1693, c. 22, upon the foundation of a right existing in the church long before. Whether the extraordinary commission was understood to have final powers or not, is doubtful; but the power declared to be in presbyteries, as a standing and perpetual commission, has never, either in that or in any other article of jurisdiction, (*e. g.* the cognizance with respect to manses and glebes,) been held to be final, nor could any reason of expediency or justice be figured for vesting such a power without control in any inferior judicature, such as a presbytery.

"The case of strong and idle vagrants mentioned in p. 70 of the memorial, seems to be misunderstood. A power of cognizance is given to kirk-sessions, because the fines are applied to the support of the poor; but the act 1600, c. 19, says expressly, that there shall be a control in the presbytery, and if in the presbytery, it must from thence go to the superior kirk courts. But at least there is a power of review somewhere, and nothing that either a kirk-session or a presbytery could do, in that matter, would be final.

"The same thing is to be said as to the steeping lint, the fines being applicable to the poor.

"As to the distinction attempted between one kind of qualification and another, and the difficulty of trying professional skill in the Court of Session or General Assembly, the matter is easily extricated. No such distinction is to be found in the statute, and nothing is more easy than trying professional skill in a court of review, by remitting the matter to persons of skill, to take trial and report, in the same way as is every day done in matters of accounting.

"The case of mechanics, and judging of the essay piece of any candidate to be admitted to any incorporation, admits of an answer. A corporation may do great injustice, and be guilty of great oppression, if a majority of its members are allowed to judge finally upon such points. Accordingly, their actings must be liable to control in the higher courts, such as the Conventry, the Magistrates, or the Court of Session; and it is presumed that the proceedings of a presbytery, in licensing preachers, or trying the qualifications of ministers, are liable to review in the superior church courts.

from every sentence of a presbytery relative to this matter, to the synod, and from thence to the General Assembly, being the courts to which, according to the constitution of the church, an appeal lies, as to all matters and causes

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“As to manses and glebes, upon examining the acts of Parliament, it will be found that none of them vest any proper jurisdiction in the presbytery, though by custom they have assumed the jurisdiction, subject to control in the Court of Session, as the supreme civil court. The act 1572, c. 48, taking it for granted that there were manses and glebes already existing, which belonged to parsons and vicars, declares that the “manse maist nearest to the kirk, with four acres of the glebe lying contiguous, or maist nearest to the manse,” shall be specially “marked out and designed by the bishop, superintendent, or commissioner of the diocese, with the advice of two of the most honest and godly of the parishioners, as a manse and glebe for the minister serving the cure in time coming;” and the acts 1649 c. 45, and 1663 c. 21, ordain the heritors, at sight of the bishop, or such ministers as he shall appoint, with two or three of the most knowing and discreet men in the parish, to build manses, and the heritors to be at the expense of repairing. These acts appear to have laid the foundation for the customary jurisdiction, assumed by presbyteries, in designing manses and glebes, but which in law, seems to require the concurrence of the heritors or parishioners; and hence the powers of the presbytery or church, go no further than simply to design, *i. e.* point out what is necessary to be done, in the same way as they may call upon the heritors to contribute the necessary fund to a schoolmaster; but they have no further power over schoolmaster’s salaries; see *Brown v. Heritors of Dunfermline*, 22d July 1768, (Mor. 7689), and in the same way the church courts have no further power over manses and glebes; but the parties who have the patrimonial interest must be left to their remedies at common law.

“At the same time, if the members of a presbytery were to decline doing their duty in designing a manse or a glebe, by refusing to give any determination at all, it is thought the remedy would be, by appeal to the Synod and General Assembly, to compel them. If they once execute the trust committed to them, they are *functi*, and neither they nor their superiors have more to do in the business; but it is on all hands admitted that still there is a power of review: viz. in the Court of Session.

“2d. Question. Whether, in the case of schoolmasters, the review is in the Court of Session or superior church courts? After the profusion of learning we have had on this question, it remains where it did. The act 1693 means to give exactly the same power

1800. which come under cognizance of presbyteries. This jurisdiction of the presbyteries relative to the qualifications of schoolmasters is not a ministerial power, conferred upon them *vi statuti*, and which is enjoyed by them independent

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and the same cognizance as in the case of ministers ; and whether wisely, and according to just principles or not, considers the jurisdiction in the one case to be just as much ecclesiastical as the other. This is the plain construction of the act ; and it is put beyond doubt by the explanation which it has received in practice as well as by the prior foundation which it had, both before and since the reformation. Besides, why may not a cumulative jurisdiction be supposed ? In the case of universities, there are ordinary and extraordinary visitors. Even in the schools, we have this lay and clerical visitation. And in the commission 1690 and the act 1693, this Court, like the Court of King's Bench, may have a right of visitation or control, if we were applied to, and a case of injustice or oppression stated, yet the ordinary procedure may be in the church courts ; and the presbytery may remain, as it ought to be, subject to have its proceedings in all matters of discipline corrected and reviewed by the superior church courts. Supposing the case had come directly to us from the presbytery, we could not have done better than to have sent the parties to the synod for examination of the candidate there.

Vide ante vol. II. p. 277. In the case of Campbellton, the objection never was before the presbytery at all, but originated before the magistrates, and the matter of jurisdiction was very much overlooked. The presbytery is not only an inferior, but a subordinate court, like inferior commissaries and admirals, conveners, &c. ; in all which the superior court of the same nature, as well as the Court of Session, has a right to review. See also Erskine B. I. tit. 2, p. 9, where the doctrine is not very accurately treated.

" The objections to Mr. Allan were twofold :—1st. Cruelty to the scholars, of which a proof ought to have been allowed. 2d. That he could not teach Latin, which was a fact admitted. Both of these were matters of judgment, which any court as well as the presbytery can judge of. It is not like the case of a comparative trial of skill. The cognizance of the schoolmaster's deportment was, antecedent to the act 1693, understood to be in the kirk courts, as a matter connected with ecclesiastical polity. The act 1693 does not confer this right *ab initio*, but means to declare and regulate it. The act had no occasion to mention appeal from presbytery ; and this necessarily followed as a matter of course. If the presbytery does wrong, it is natural that they should be corrected by the superior church courts, who may call the schoolmaster before them, and examine into the

of the church courts; but is a branch of their own proper ecclesiastical jurisdiction—that these trials and examinations have always been considered matter of proper ecclesiastical jurisdiction; and therefore the only right of review lay in appeal to the superior ecclesiastical court, which alone had power to review, and therefore the Court of Session had no jurisdiction in the matter.

Pleaded for the Respondents.—In spiritual matters the Church of Scotland acknowledges no power of control, even by the crown or the legislature; but the church courts have no civil jurisdiction. The censures of the church have no patrimonial consequences, and civil magistrates are prohibited from carrying their sentences into execution. The church courts cannot directly deprive a clergyman of his benefice, because this is a patrimonial right, enjoyed as a consequence of his being possessed of the clerical character. Yet they may deprive him of this clerical character, on which event his benefice falls of course, and thus indirectly the church courts can affect his civil interest. This is the only exception where church courts can interfere with civil rights. Wherever, therefore, these courts assume to themselves jurisdiction in matters civil, and do not confine themselves to matters spiritual, the Court of Session has jurisdiction to control and review the judgments of the church courts. But although church courts have no inhe-

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qualifications. It is not fit for this Court to do so. If he has done any thing criminal, it should go either to the kirk courts, or criminal courts."

LORD SWINTON.—"The sentence of the presbytery is not final—a review lies in the synod, and thence to the General Assembly."

LORD ESKGROVE.—"I am of the same opinion. The act 1693 did not mean to reverse the order of things."

LORD HENDERLAND.—"Of the contrary opinion. If the church courts have the power, they may also regulate it by laws."

LORD DREGHORN.—"The act 1693 made it clearly ecclesiastical."

LORD JUSTICE CLERK.—"The proceedings of a presbytery, in such a case, are not subject to review. Suppose the legislature had said, let them be tried by the professors of humanity of the different colleges, is not that, from the nature of it, conclusive? Could the Court of Session entertain the question in such a case I think not. It is the same here."

Lord President Campbell's Session Papers, vol. 71.

1800. rent jurisdiction in civil matters, the legislature has judged it expedient to delegate to them, by special statute, particular branches of civil jurisdiction. In these matters, however, the church courts act not as a branch of the ecclesiastical establishment, but as a civil court, vested with the special powers of the statute. One of these is the presbytery's right to judge in regard to manse and glebes, under 1572, c. 48, and 1663, c. 21. And, in like manner, the powers delegated to them under the schoolmasters act in question. Any appeal from their sentences, in questions of this nature, is competent only to the Court of Session, who have proper jurisdiction in the matter.

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After hearing counsel,

The LORD CHANCELLOR LOUGHBOROUGH said,

" My Lords,

" The matter which gave rise to the present appeal was originally a very small patrimonial interest or concern. It relates to the settlement of a parish schoolmaster, who, if successful, after a very long litigation, would gain a salary of about £10 per annum. The question at issue, however, is most important to the public, and to the ecclesiastical polity of Scotland. It has been argued on both sides with a vast profusion of learning. One of the objections made to the settlement of the schoolmaster was, that he was not qualified to teach the Latin tongue; but one of his advocates, in a long paper, where a very subtle and ingenious argument is maintained, supported his case by reasoning drawn from the practice of the Greek Church and of the Church of Rome, from the earliest periods.

" If my opinion, (however clear in my own mind it might have been,) had run counter to the opinion of the Court of Session, I should have felt embarrassment in suggesting what should be done in the present case. Though my habits of life have led me to some knowledge of the law of Scotland, I do not feel that knowledge such as to call for your Lordships to rely upon it, as I doubtless may be led to form a wrong conclusion. But I am quite relieved from all difficulty in the present case; my opinion coincides with that of the majority of the Court of Session, when the judgment prior to the last decision was pronounced, though, from the forms of the Court, which are somewhat repugnant to our ideas on similar occasions, this decision was afterwards departed from.

" Your Lordships know that the Court consists of fifteen members, the first judgment given, with which I concur, was that they had no jurisdiction in the case. Upon a rehearing, this judgment was altered, and when the last decision was pronounced, the Court was equally divided; but by the practice of the Court the Lord Pre-

sident does not vote, but when the numbers are alike exclusive of his own vote, which is then decisive. If the President had voted and given a casting vote on the same side, the majority would have been with the present appellant.

"I must not go into a detail of all the arguments which were held in the present case; the matter, I conceive, rests on the construction of a positive act of parliament, the words of which I do not find any means of qualifying, neither need I enter into a long detail of the jurisdiction to which schools were subject previous to the Reformation. Before the Reformation, schools were under the cognizance of the bishops; and, when episcopacy was abolished in Scotland, various church judicatories were appointed in place of the jurisdiction of the bishops, the first of which was the presbytery, and these courts succeeded to all the power of the bishops. In 1606, cap. 2, episcopacy was re-established, and continued to be the church government, except during the interval of the rebellion, till the revolution. At that time presbytery was re-established, ratified, and confirmed, as formerly set up, and then particularly referred to.

About the same period several acts of a temporary nature were passed; and in 1693 an act was made (cap. 22), the title of which is, "For Settling the Quiet and Peace of the Church." Certain regulations are there laid down for all ministers before being admitted to churches in future; and those who had not been expelled at the revolution are required to conform to the then church government, on pain of expulsion. These matters are contained in the enacting part of the act. Then these words follow:—"And it is hereby declared that all schoolmasters and teachers of youth in schools are 'and shall be liable to the trial, judgment and censure of the presbytery of the bounds.' And it is afterwards statuted and ordained that the Lords of the Privy Council, and other magistrates, &c. give all the assistance for making the sentences of the church, and its jurisdiction to be obeyed.

"I cannot, in defiance of this act of parliament, maintain that schools are not under the cognizance of the presbyteries. It is there expressly laid down that they are and shall be liable to that jurisdiction. Neither am I at liberty to inquire into the propriety of that regulation; though I conceive there would be little difficulty in defending this as a fit subject of ecclesiastical cognizance, and that it contained nothing incongruous with sound wisdom, propriety, or convenience. By the description of every established school in Scotland, the children on Saturdays are to be taught the Church Catechism, and trained up in the precepts of religion; and it is surely proper that those who are to inculcate to others the serving their Creator in the days of their youth, should themselves be tried upon their own principles of religion.

"A question was made, whether the power of the presbytery was merely ministerial, or if it was judicial? A ministerial act, in my opinion, is where a person is enjoined to do an act of which he

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1800. is not left at liberty to judge whether it be right or wrong :—they execute a thing which is merely personal to themselves ; but when a trial is to take place, perhaps by the means of witnesses, that is a judicial act. Such an act is here vested in the presbytery, which is one of the inferior church judicatories.

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The late Jus-
tice Clerk
M'Queen.

“ One of the judges in the Court below was of opinion that the judgment of the presbytery was final : and he was also of opinion that the Court of Session had no jurisdiction. But whether the judgment of the presbytery be final or not, I entirely agree with Mr. Solicitor General that the Court of Session has no right to say so. I do not give it as my own opinion, that the judgment of the presbytery was final ; but it would be much easier to maintain that doctrine, than that the Court of Session had any jurisdiction whatever.

“ There is a rotation of courts of ecclesiastical jurisdiction in Scotland ; from the presbytery an appeal lies to the synod, and from the synod to the General Assembly. It will be with the General Assembly to declare whether the appellate jurisdiction takes place in this case or not ; nay more, it is in their power, in conjunction with the King's Commissioner, to make regulations on the point, and to new model the inferior courts.

“ In the course of the argument, it was given up on the part of the respondents that this could be carried to the Court of Session by way of jurisdiction. It was contended, however, that much inconvenience and delay would occur, if appeals were allowed to be carried to the synod, and from thence to the General Assembly ; but how would this be mended by giving jurisdiction to the Court of Session, before whom we see it might be argued for several years, and then come before your Lordships ? No part of the ecclesiastical jurisdiction in Scotland can go to the Court of Session except where it is so appointed by the legislature, as in consistorial cases relative to matrimony and wills, which may be reviewed by the Court of Session, as directed by an act of parliament. But, since the Reformation, the consistorial courts, too, have been wholly in the hands of laymen.

“ I have stated to your Lordships what, in my mind, is sufficient ground for reversing the last judgment given in this case by the Court of Session, and affirming the first interlocutor.”

It was ordered and adjudged that the interlocutors of the 21st May and 26th Nov. 1793, complained of in the appeal be reversed ; and it is further ordered and adjudged that the interlocutor of 25th May 1792 be affirmed.

For the Appellant, *J. Grant, Wm. Adam, Wm. Robertson.*

For the Respondents, *Henry Erskine, D. Douglas.*

(M. 8482.)

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JOHN STEIN, Esq., Distiller,	.	.	.	Appellant;	STEIN
WM. FARRIES, Spirit-Merchant in Ecclefechan,				Respondent.	v.
					FARRIES.

House of Lords, 24th March 1800.

SALE—OFFER AND ACCEPTANCE—CONDITIONAL.—The respondent wrote the appellant making proposals for a sale of spirits, and requesting to know, in course of post, the lowest price at which he would sell the spirits for cash. The appellant replied that he would give him the spirits at 3s. 2d. for cash, and 3s. 4d. at three months' credit; and requesting to know, *in course of post*, whether he would accept. The respondent did not reply *in course of post*, nor for six days thereafter. In the interval, the price of spirits had risen considerably, and the seller again wrote him that he could not now sell him the spirits at the prices mentioned. In an action of damages for non-fulfilment: Held him liable; Reversed in the House of Lords, on the ground, that as the condition on which the offer was made was not complied with, the appellant was entitled to consider it at an end.

The respondent, of this date, wrote the appellant, proposing Nov. 7, 1797. to purchase of him spirits, in the following terms:—"Sir, As I have sold five puncheons of aqua vitæ (British spirit of malt) I bought from you the last time Mr. Brown was in this place, thinking that the other five are over few for me, I wish to have eight or ten puncheons more, if you will be reasonable in your price. Ready money I will give for the whole; so, in the course of post, write me the very lowest you mean to take." The following answer was returned:—"Canon- Nov. 10, 1797. mills, 10th November 1797.—Sir, I am favoured with yours of the 7th inst. I have no objections to let you have other ten puncheons upon the same terms as the last, say 3s. 2d. cash, and 3s. 4d. three months credit; the whole to be taken away in the course of this month. *Expecting your answer in course.*—I remain," &c.

No answer came to this letter until six days thereafter, namely, on the 17th November, when, in the interval, the price of spirits rose considerably. This letter intimated acceptance of the offer, and agreed to the terms proposed. In reply to this communication the appellant wrote, "Not Nov. 19, 1797. having received your answer in course to my letter of the 10th instant, I have since disposed of the spirits otherwise, and therefore cannot now accept of your offer."

Action being brought, for damages for failure to imple-

1800. ment the bargain, the question, in these circumstances, came to be, Whether an offer to sell a certain quantity of spirits, at a certain price, where the offerer desires an answer in course of post, he is still bound by his offer, if no answer is returned in course of post?

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The Lord Ordinary repelled the defences, and decerned in terms of the libel. On two several representations he adhered. And, on reclaiming petitions to the Court, the Lords adhered.

Feb. 2, 1798. —
June 26, —
Nov. 13, —
Dec. 4, 1798.
Mar. 8, 1799.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—When an offer to sell goods is made by one person to another, expressly requesting an answer to the offer in course of post, the offer is no longer binding on the party after expiry of that time; and unless this were to be the rule, the parties would be placed in situations extremely unequal, the one being in a situation to derive all the advantage, the other exposed to all the loss arising from any supervening change in the state of the market. A verbal offer ceases to be binding unless acceded to immediately. And the same rule follows, and ought to apply to a written offer; and, accordingly, in mercantile usage, an offer made in a post letter ceases to be binding unless the person to whom it is addressed declares his acceptance, either in course, where the interval betwixt the arrival and departure of the post is sufficient to enable him to do so with convenience. The letter of offer, in this case, was dated and dispatched on the 10th November. It would arrive at Ecclefechan on the morning of the 11th, and, if he meant to accept, he might have answered by the return of post, which leaves Ecclefechan at six o'clock the same evening. Instead of this, he does not reply till the 17th November, when prices had considerably risen. If the offerer were to be held bound in these circumstances, it is clear that it would result in manifest injustice and hurt to the offerer. Nor is it any answer to plead ignorance of mercantile usage on the respondent's part, because here the letter of offer expressly bore that an answer was requested in course of post. And where an offer is sent, thus expressly qualified with a condition of "an answer in course," the rule above alluded to must the more imperatively follow, and the party offering to sell be free, unless his offer be accepted of within the time specified.

Pleaded for the Respondent.—The appellant offered the spirits for sale, not under condition only of his offer being

accepted of within a specified time, but only in the usual manner of such letter of offer, which makes use of the terms, "in course of post," as a phrase common to all letters in general. The appellant therefore having sold, was bound to deliver the quantity of spirits above mentioned to the respondent; and the respondent has sustained damage by the refusal to deliver to the amount of £40, to which sum he has restricted his claim.

After hearing counsel,

LORD ELDON said,—

"MY LORDS,

"The condition on which the offer was made not having been complied with, Stein was entitled to consider it as at an end; I am decidedly of opinion that it would place the offerer on very unequal terms, were it to be left to the person to whom an offer is made to accept it, after a rise perhaps had taken place in the price of the commodity. It was incumbent in this case, upon Farries to use due diligence in answering Stein's letter, which he had not done; and the apology, attempted on the ground of the former course of dealings, had no place in the question, which depended entirely on the latter making the offer, and the answer to it."

It was therefore

Ordered and adjudged that the interlocutors complained of be, and the same are hereby reversed.

For the Appellant, *W. Adam, Ad. Gillies.*

For the Respondent, *Wm. Grant, M. Nolan.*

(M. 11032 et 11045.)

WILLIAM RIDDICK of Corbieton,	<i>Appellant;</i>
DOUGLAS, HERON and Co., late Bankers in	} <i>Respondents.</i>
Ayr, and GEORGE HOME, Esq., their Fac-	
tor and Manager,	

(*Et e contra.*)

House of Lords, 2d April 1800.

BOND—CAUTIONARY OBLIGATION—SEPTENNIAL LIMITATION.—

A decree in absence had been obtained against the representative of the cautioner within the seven years, together with certain correspondence had, with his factor, seeking delay to pay the debt; Held the correspondence sufficient to elide the prescription, though no "legal diligence," in the sense of the statute, had followed on the debt *within* the seven years.

William Kirkpatrick, merchant in Dumfries, obtained a

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loan from the respondents' bank of £3000 in the year 1773 ; and Robert Riddick, the appellant's father, and David Currie of Newland, became cautioners for him, by bond conceived in these terms :—" That by a preliminary agreement between Alexander Johnson, Hugh Lawson and Co., late bankers in Dumfries, and Douglas, Heron and Co., I, the said William Kirkpatrick, was to have a credit for discounts with the said Douglas, Heron and Co., to the extent of £3000 sterling, to endure for seven years, from and after the 29th October 1771 ; and that by subsequent agreement between the directors, ordinary and extraordinary, of the said Douglas, Heron and Co., and me, the said William Kirkpatrick, at Dumfries, 5th day of November last, it was covenanted and concluded; that the said credit for discounts should cease, and that the same should be *converted into a fixed loan for six years.*" And " that the said Douglas, Heron and Co., have, conform to their said agreement, upon June 4, 1773. " the date hereof, advanced in loan to me the above mentioned sum of £3000, whereof I grant receipt," &c. The bond then obliges the principal debtor and his two sureties in the following terms :—" Therefore, I, said William Kirkpatrick, as principal, and we, the said Robert Riddick and David Currie, as *cautioners*, sureties, and full debtors, with and for me, bind and oblige ourselves, *principal and cautioners* foresaid, conjunctly and severally, and our respective heirs, executors, and successors, to pay and again deliver to the said Douglas, Heron and Co., or to their successors or assignees, or to one of their cashiers, the above-mentioned sum of £3000 sterling money, against the 29th day of October, in the year 1778, with £600 sterling of penalty, and liquidate expenses in case of failure," &c.

Robert Riddick, the appellant's father, died four years after becoming cautioner in this bond. When it fell due, letters of horning were raised on it, against Kirkpatrick the principal, and Currie, the surviving cautioner, but a charge was only given against the former. Nothing further was done. About three years thereafter, Kirkpatrick became bankrupt. Currie afterwards went abroad, having sold extensive estates in Scotland.

In January 1778, an action was raised against the appellant, in order to constitute the personal obligation undertaken by his father against him, and decree in absence upon the *passive* titles was accordingly obtained against him before the Court of Session, within the seven years in which bonds prescribe against cautioners. Nothing followed on this decree in ab-

sence. But a correspondence was held with the appellant's factor, who sought delay, and promising payment, and £500 was paid to account. It was not until 1790, ten years after the seven years had expired, that legal diligence of any kind was done against the appellant for this debt, when letters of horning were raised, and a charge given to the appellant. He suspended; and, at same time, brought an action of reduction of the decree in absence obtained in 1779. A second action for payment had also been raised by the respondents. These were all ultimately conjoined; and the defence pleaded by the appellant was, 1st. That the bond had incurred the statutory limitation of cautionary obligations. The act 1695, c. 5, declares that "no man binding and engaging for hereafter, for and with another, conjunctly and severally, in any bonds, or contracts for sums of money, shall be bound for the said sums for longer than seven years, the said cautioner shall *eo ipso* free of his caution," with this proviso or exception, "that what legal diligence by inhibition, horning, arrestment, adjudication, or any other way, shall be done within the seven years by creditors against their cautioners for what fell due, shall stand good, and have its course and effect after the expiring of the seven years." 2d. That no legal diligence, in the sense of the act, having been done, either against him or his father, within the seven years, and the decree in absence not being legal diligence, the obligation was prescribed. In answer, it was maintained, 1. That Robert Riddick, the appellant's father, though expressly bound as cautioner, was not entitled to the benefit of the act, because he had not a clause of relief in the bond, nor an intimated bond of relief apart. 2. That legal diligence was done within the seven years, because the decree obtained against the appellant in 1779 ought to be held as legal diligence; and, 3. That, supposing the appellant's obligation fell under the statute, he was barred from pleading it *exceptione doli*; because William M'Dowall, appointed to act as factor by the appellant and his curators, in the conduct of his affairs during his minority, had, within the seven years, solicited delays of payment, and given promises of payment of the debt in question to the respondents' manager, Mr. Home, as was shown by correspondence, and therefore it would now be fraud in him to take the benefit of the statute.

The Lord Ordinary pronounced this interlocutor:—"In July 9, 1791. "respect that the said company obtained a decret before "the Court against William Riddick within the seven years;

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1800. " finds the letters orderly proceeded in the suspension,
 " assoilzies them from the reduction at his instance, and in
 RIDDICK " the ordinary action at their instance against him, decerns
 v. " for the sums libelled, except as to the expenses, as to
 DOUGLAS, " which finds expenses due ; modifies the same, as hitherto
 HERON & CO. " incurred, to £12 sterling, and decerns for this sum and
 " for the full expenses of extract." On reclaiming petition,
 Nov. 22, 1792. the Court found, " that as by the bond in question, the pe-
 " titioner's father was bound expressly as cautioner, there
 " was no necessity for a clause of relief in the bond, or a
 " separate bond of relief intimated to the creditors, in order
 " to entitle the cautioner to the benefit of the statute 1695.
 " But in respect of the correspondence between the pursuer
 " and the factor for the petitioner's curators, they find, that
 " the petitioner is barred *exceptione doli* from pleading
 " the benefit of the statute ; and *separatim*, in respect of
 " the decret of constitution 28th January 1779, obtained
 " within the seven years, they adhere to the interlocutor of
 " the Lord Ordinary reclaimed against, and refuse the de-
 Mar. 1, 1793. " sire of the petition." * On a second reclaiming petition,
 the Court " find that the decret of constitution 28th Janu-
 " ary 1779, could only have the effect to make the defender
 " liable for the principal sum and interest falling due
 " within the seven years ; but in respect of the correspond-
 " ence between the pursuers and the factor for the defend-

* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL.—" This is a question on the septennial limitation of cautionary obligations, and whether it was stopped by decree.—*Vide* the case of Stephen Maxwell v. Reid, 9th February 1786. There seems to be nothing in the two first points pleaded in the answers. But the third point, as to the effect of the letters or correspondence, none of them are very explicit, yet all of them infer an acquiescence on the part of M'Dowall in the justice of the demand, and some of them, within the seven years, seem virtually to homologate the debt. But the question still remains, if the effect of such an acknowledgment could last more than seven years.—*Vide* the decisions in Kilkerran and Dalrymple. The charge of horning was not till December 1790, after another seven years had elapsed. 4th Point.—The effect of the decree in January 1779. A decree constituting the debt against the heir seems to be sufficient diligence. Erskine probably had not that case in view, and he quotes no authority. But he and Bankton are not at one in their opinion ; and the question concerning the effect of a simple decree against the cautioner here, within seven years, without any other diligence, has never yet been settled."—President Campbell's Session Papers, vol. 69.

“er’s curators, they adhere to that part of their former
“interlocutor reclaimed against, finding the petitioner bar-
“red *exceptione doli* from pleading the benefit of the
“statute, and in so far refuse the desire of the petition.”

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Against the interlocutors of 9th July 1791 and 22d Nov. 1792, and 1st March 1793, the present appeal was brought,—the respondents on their part bringing a cross appeal, as to the finding in the interlocutor of 22d November 1792, declaring that as the appellant’s father in the bond in question was bound expressly as cautioner, there was no necessity for a clause or bond of relief, to entitle the cautioner to the benefit of the statute; and to the interlocutor of 1st March 1793, finding that the decree of constitution could only have the effect of making the defender liable for the principal sum and interest falling due within the seven years.

Pleaded for the Appellant.—The act 1695, c. 5, is a statutory discharge to the cautioner upon the expiration of the seven years, just as complete and effectual as if the creditors had given him a voluntary discharge and acquittance, by a writing under their hands, unless the case can be brought within the proviso of legal diligence. Upon a recital in the preamble of the act, of the evils of suretyship, and men’s facility to enter such cautionary engagements, the statute enacts, That no cautioner, in any bond for sums of money, “shall be bound for the said sums for longer than seven years after the date of the bond, but that from and after the said seven years, the said cautioner shall be *eo ipso* free of his caution.” And it adds only one exception, being that of legal diligence done within seven years. This is not a mere prescription, but an absolute and *ipso jure* liberation of the cautioner after the seven years, the statute declaring the cautioner *eo ipso* free, as if no obligation had ever existed. The question then comes to be, has there been any legal diligence done in the sense of the statute, in order to bring the case within the exception? In considering this question, the ordinary rules applicable to the interruption of prescription cannot here apply, because it is a limitation which operates an absolute extinction of the obligation; and, therefore, though the cautioner should, within the seven years, have granted a declaration that he stands bound for the debt; or, although an action be brought, and even decret obtained, still that will not be diligence in the sense of the statute, so as to stop the effect of the statutory limitation.

So the law has been laid down by Erskine, B. iii., tit. 7, § Edgar, p. 39.
24. In the case of Norrie v. Porterfield, 17th February Mor. 11013.

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1724, subscribing a note at the bottom of the bond within the seven years did not exclude the cautioner from pleading the statutory limitation. And, in *Carrick v. Carse*, a cautioner, having through ignorance of the law, paid the debt, after the seven years, was found entitled to claim repayment. Neither the decree therefore obtained in absence against the appellant within the seven years, nor the letters and correspondence had with his factor, while in minority and under curatory, are legal diligence in the sense of the statute; nor can they come under the words, "*or any other way*," because the words following a particular enumeration of diligence, must be interpreted as meaning diligence of some other kind of the nature of diligence, which is a technical term known in the law of Scotland, and signifies a mode of execution by which the estate of the debtor is attached. But an action and decree in absence is not legal diligence, far less the correspondence of a third party. A decree in absence is in many cases of no effect in law. It is not legal diligence, for this is a term synonymous with execution. And if a decree is not so, neither can the correspondence of a third party, in any rational view, be construed to mean "legal diligence." And in regard to the *exceptio doli*, there is not the least vestige for supporting such a plea in bar of the statute. And, finally, in regard to the cross appeal, it has been decided over and over again, that those who are bound expressly as cautioners have the benefit of the act, although there be no clause or bond of relief, which latter are only necessary where the party is bound as co-principal and full debtor.

Pleaded for the Respondent.—The act 1695 is inapplicable to this case, which is that of a corroborative obligation, and not a security for money instantly advanced. The appellant, besides, is not a cautioner within the meaning and sense of the act, because the bond contains neither a clause of relief, nor is there a separate bond of relief intimated to the creditor. And even supposing it otherwise, the appellant would still be barred from availing himself of the benefit of the statute, because, by the correspondence founded on, he is barred *exceptione doli* from taking the benefit thereof. He is further barred by the decree in absence obtained against him within the seven years; for though a decree in absence is in general subject to review, yet, until set aside, it is effectual in law, and must either come under the term legal diligence, or the words, "in any other way."

After hearing counsel,

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LORD ELDON said,—

“ My Lords,

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“ The question at issue, by this appeal, arose upon the following circumstances:—In 1772, Mr. Kirkpatrick, a merchant in Dumfries, was indebted, upon a balance of accounts, to Messrs. Douglas, Heron and Co., in the sum of £3000. For this sum, he executed a bond to them in 1773, in which the appellant's father and a Mr. Currie were his cautioners. The term of payment was more than five years after the date of the bond. By an act of the Scots parliament in 1695, this bond expired as to the cautioners, and became a nullity as to them, in June 1780, if certain transactions which were had upon it in the Courts, and certain transactions between the parties, do not take it out of the statute.

“ The appellant's father having died; after his death the bond was registered in 1778, and a horning raised against Kirkpatrick and Currie, on which a charge was given to Kirkpatrick. The appellant being then a minor, the respondents, in 1779, took a decree against him for payment of the bond, on what is termed the passive titles, but no horning was raised upon it. This decree found that the appellant represented his father, and that the bond was due.

In 1779, a new action was brought against the appellant on the original bond, without taking notice of the former decree, and concluding against the appellant for payment of the bond, deducting a partial payment made therein, which was a material circumstance. The appellant, in defence, pleaded that the bond was cut off by the act 1695. In reply, the respondents founded on the decree 1779, contending that this was legal diligence, and brought the bond under the exception of the act. The appellant then brought a reduction of the decree of 1779; and the respondents, in 1790, gave him a charge of horning on that decree, which the appellant brought under review by suspension. These three actions were conjoined. By a subsequent process, the parties were furnished with the letters of correspondence, which I shall afterwards allude to more particularly.

“ The points which arose between the parties, and which the respondents insisted upon were, 1. That this was not a bond within the meaning and intent of the act 1695, not being for money advanced at the time. 2. That the appellant could not claim the benefit of the act, because he had no claim of relief, or separate bond of relief. 3. That the decree of 1779 was legal diligence to take the bond out of the statute, and to enforce payment of it, with seven years interest, or with interest till payment. 4. That the appellant was barred *exceptione doli* from pleading the statute; and, in support of this, they referred to the letters and correspondence between the parties, and, on this ground, they insisted that interest was due till payment of the bond.

“ On the first point, it was answered, that the bond was clearly

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within the statute, being for payment of money, which was all that the act required. With regard to the claim, or separate bond of relief, it was contended that these were unnecessary, because it appeared on the face of this bond that Riddick was a cautioner, which was equivalent to the clause or bond of relief mentioned in the act. The appellant insisted that a decree was not legal diligence in terms of the act, and even if it were, he has since argued, that by some error in the proceedings no such decree existed, it being a mere nullity. He contended too, that there was no ground for the *exceptione doli*, and that he had not lost the benefit of the act.

“ With respect to the first point, though it is not my intention to give an opinion on some points of the cause, yet I conceive I do not go too far when I say, that, in my opinion, the act does not require the money to be immediately advanced, and that this objection is ill founded. And as in 1729 a decision was pronounced, finding that there was no necessity for a clause of relief, or separate bond of relief, if it appeared on the face of the bond that a person was a cautioner, you will not think I go too far, when I say that it is now too late to go against that decision.

Ross v. Craigie, Dict. vol. II. p. 116.
 (Mor. 11014.)

“ With regard to the objection, that the decree was a nullity, it is not my wish to enter into this; it was not brought before the Court of Session, but first started before your Lordships. If it were necessary here to enter upon it, it is not too late to do so. On the point, whether a decree be legal diligence or not, if it were necessary to enter into it, we should undoubtedly have paid great respect to an unanimous decision of the Court on a point of practice, yet, when I look at the statute, and at the authorities which are adduced by the appellant on the subject of confining legal diligence to the *executorials* of the law, I should have found difficulty in reconciling these authorities, and the conviction of my judgment upon them, with the decision of the Court.

“ But, if my view of what rules the case be well founded, it is not necessary to enter into that matter. I doubt, whether what I deem to be the ruling point in this cause, be well expressed by the words *exceptio doli*. If the appellant had given the respondents hopes of payment, to prevent their doing diligence, with a view of afterwards pleading the statute, that would undoubtedly have been *dolus*; but the parties acted with good faith, distinctly meaning to pay the bond, which they had over and over again promised to do, and which promise the appellant, when he came of age, fully confirmed, and intended to perform.

“ (His Lordship here stated the interlocutors appealed from.)—The interlocutor of the Lord Ordinary was founded entirely on the decree being legal diligence. The first interlocutor of the Court stated a new principle, the *exceptio doli*. The second interlocutor of the Court against the appellant, I suppose to mean this—if you take under the statute, you get your principal and seven years’ interest;

but if it is on the correspondence, it is out of the statute, and you shall take the interest till the principal is paid.

"The appellant has brought his appeal against these interlocutors; and the respondents have brought their cross appeal against those parts of the interlocutors which find that the cautioners in the bond in question came within the operation of the statute, and that the decree 1779 could only have the effect to make the defender liable for the principal, and interest within the seven years.

"On these propositions I do not object to give an opinion, that I think the Court were right upon these points; but if the cause is to be decided, as I think it ought to be, upon the correspondence, it is taken out of the operation of the statute altogether. I put the question for determination thus,—Supposing no decree had been taken, or that a decree was not legal diligence, Whether or not, under the circumstances of the case, and the correspondence that was had, the appellant, though a cautioner, and after the lapse of the seven years, was still bound to pay the principal, with interest down to the time of payment?

"Your Lordship will recollect that by the acts of Parliament in Scotland, applying the forty years' prescription to bonds, a bond was made of *no force* after the lapse of forty years. I conceive that a bond of caution came originally under these acts; but by the act 1695 it was put under a new regulation, and the act declared that after a lapse of seven years, the cautioners should be *eo ipso* free,—which was, in other words, declaring that the bond was of *no force*. To this act was added an exception, which seemed necessary, to avoid a mischief which would have been as great as that which the act proposed to remedy, viz. that if certain kinds of diligence were done within the seven years, that diligence should have its course after the seven years were expired. But the statute does not determine what the conduct of parties should be subsequent to the seven years, and it is wrong to say that no act of the cautioner could keep alive the bond, except legal diligence was done upon it.

"I confess I was surprised when I read, in this case, that the act not only respects cautioners, but also the public. I allude to the case, where it was held that a person was not allowed to decline the benefit of the statute. If this was founded in public justice, no bond of corroboration could stand, as being out of the statute; and if it be matter of public policy, it is singular that a cautioner paying the bond has a remedy against the co-cautioner for forty years. In this country he would only have the same remedy which the creditor had against himself.

"Notwithstanding what is laid down by Erskine and Forbes, yet if the case of Wallace and Campbell be a good decision, it is impossible to say that a promise of payment does not take it out of the statute. In that case, after the lapse of seven years, a cautioner paid a debt, and the question arose, whether this was a voluntary payment or not? The Court said, that if the cautioner promised to pay with-

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Norrie v.
Porterfield,
Feb. 19. 1724.
Edgar, p. 39,
(Mor. 11013.)

Kilkerran, p.
423, 1749.
(Mor. 11026.)

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in the seven years, the statute would not apply, and that there was no reason to say that a cautioner might not be bound by a promise, as well as by a bond of corroboration. And, in this case, the Court decided against the cautioner, not because there was, but because there might have been such a promise.

“ In the case of Carrick v. Carse, the question was totally different, not whether a debt could be kept alive against a cautioner by his promise, but whether or not a party, after the lapse of the seven years, still thinking himself bound by the statute, had a right to get back the payment he had made in ignorance of the law.

“ The present case bears no resemblance to that of Carrick v. Carse. When payment of the debt was demanded here from those acting for the minor, they were anxious to deliver their pupil's estate from the diligence which was threatened. They with solicitude entreat a delay, while they could not but know that they were addressing themselves to a creditor, who must understand them as craving indulgence for their pupil's benefit.

“ Having stated this ground of difference between the two cases, I may enquire, whether or not there has been any fraud in the present case. In my opinion, it is not a correct mode of stating the ground of decision, to place it on the head of fraud. After a series of promises, which, I doubt not, were meant to be kept, it still was not absolute fraud to found upon the statute. The rule of law is not to be found in fraud, but in the promises repeatedly made by the factor, and which Riddick approved of and acceded to, when he came of age. These, in my view of the case, bound him, though the decrees were not legal diligence. After the decree, too, £500 were paid, and another considerable sum.

“ After the expiration of the seven years, Mr. Home's letters consist wholly in threats, and on the other side there are no promises of payment, but, before the lapse of the seven years, it is impossible to deny that payment was not refused. It is stated that ruin to the pupil must be the consequence of rigorous measures; Mr. Home is requested to deal with Kirkpatrick, and a promise is made to club a payment of £1000 with Currie. The solicitations for delay are repeated in many letters, when each party must have understood that the one was asking, and the other granting an indulgence.

“ In answer to this, the appellant contends, that asking an indulgence is not sufficient. But in this, in my opinion, he is wrong; it was a promise to pay under such a statute, an express undertaking, that if the other party would forbear doing diligence, they should not be the worse for it.

“ The correspondence still continues after the expiration of the seven years; Riddick settles with his factor for all his dealings, and thanks him for the attention paid to his affairs. In my opinion, his thanks were particularly due to the factor, for his conduct in this transaction. But this is not all, he proceeds to operate his relief

against Kirkpatrick, considering himself liable as far down as 1784 or 1786. In my opinion, it is perfectly sufficient on the respondent's part, if your consciences are satisfied, that the one party understood he was undertaking for a future payment, on condition of the other's granting him an indulgence, and this other had the same ideas on the subject, and it is obvious, that if the conversations which took place at various times between the parties could have been given in evidence, you must have seen promises of payment often repeated.

"On these grounds, I state that it is not necessary to say, whether the decree be legal diligence or not, to lay anything on the *exceptio doli*, nor to decide on the merits of the cross appeal; but, attending to the case of Wallace and Campbell, the safe ground of decision seems to be, the promises of payment which take this case out of the statute 1695. It is this act alone which narrows the payment of interest to seven years, and as the statute does not apply, of course interest will be due till the principal is paid.

"I therefore move that the interlocutors be affirmed, leaving out the words "*exceptione doli*."

LORD CHANCELLOR LOUGHBOROUGH said,—

"I shall trouble your Lordships only with a few words, not wishing to abridge what has been so ably stated. I concur with the noble and learned Lord on the two points which he has submitted for decision.

"I find little difficulty in concurring with the Court, that this bond must be held to be within the statute, and that, in a case upon the statute, the interest must be confined within the seven years.

"The appellant stated other two points, namely, that the decree was erroneous, and that a decree was not legal diligence in terms of the act. On these points, I confess I feel total doubt and uncertainty; on the one side, we have the unanimous decision of the Court on a point of pure practice;—on the other, we have a very able argument of the appellant, supported by decided cases, by authorities from the law writers, and by instances of similar expressions in other statutes. None of these, however, are necessary to the discussion of the present case; and I trust your Lordships will think it more advisable, in a case of appellate jurisdiction, where there is a point of paramount consideration, not to interpose your authority, either for or against propositions which do not necessarily call for your discussion."

It was

Ordered and adjudged that it is unnecessary to decide upon the question debated before the Lord Ordinary, and decided by his interlocutor 9th July 1791, and which was affirmed by the Lords of Session, 22d November 1792 and 1st March 1793. And it is further declared, that it is unnecessary to decide upon the parts

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of the interlocutors complained of by the cross appeal, in respect of the transaction which is proved by correspondence between the respondents and the factor of the late appellant and his curators, and which is established to have been approved by the late appellant, whereby he is barred from insisting on the benefit of the act 1695; and, on this ground, it is ordered and adjudged, that the rest of the interlocutors complained of in the original appeal, be affirmed, with the following variations, viz. in the interlocutor of 22d November 1792, after the word (barred) leave out (*exceptione doli*), and in the interlocutor of 1st March 1793, after the word (barred) leave out (*exceptione doli*). And it is further ordered that the said cross-appeal be dismissed this House.

For Appellant, *W. Grant, Matthew Ross.*

For Respondents, *Ro. Dundas, Geo. Ferguson.*

MESSRS. SAMUEL BIRNIE & CO.,

Appellants;

MRS. HELEN WEIR, Bleacher at Longloch,

Respondent.

House of Lords, 16th May 1800.

SALE—IMPLIED WARRANTY—THE GOODS MUST BE FIT FOR THE PURPOSE FOR WHICH THEY ARE BOUGHT.—In this case, certain potashes were represented as of equal efficacy with the American potash, for bleaching and whitening clothes, and much cheaper. A party bought several casks, on the faith of this representation. In using them, they whitened the clothes equally well, but the goods, after being sent home and unpacked, when exposed to the atmosphere, lost their white colour, and assumed a reddish or bluish colour, according to the humidity of the atmosphere. In an action for the price, conjoined with an action of damages raised by the buyer; held that she was not liable in payment of the price, but entitled to damages, and damages awarded accordingly.

The respondent had for many years carried on the trade of bleaching, and had been in the practice of using the American potash, which was generally used for the purposes of bleaching. Having heard that the British potashes, as manufactured by the appellants Messrs. Birnie and Co., which had been advertised as far cheaper, and equal in quality in producing the same effects with the American pot-

ashes, the respondent's son went to the appellants' manufactory, saw Mr. Birnie's brother, and had handed to him the following card or bill of recommendatory directions as to his British potash, as follows:—

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“ Of the British Potashes.

“ The British potashes, also manufactured by Samuel Birnie & Co. are a very powerful kind of ashes, being the “ mineral alkali in a caustic state, and have been found to “ answer every purpose in bleaching, and equal to the best “ American pot ; and, in making pencil and China blue for “ printing, they have been found superior. ‘ They are to be “ used in the same way with American potashes, which they “ resemble much in their quality, and produce the same effects in bleaching.”

Finding the appellants' British potash so represented, the respondent's son ordered a cask, which was furnished, and the ashes having been used with temporary success, and without discovering any defect, two more casks were ordered, were furnished, and used in the same manner in bleaching as the American potash had been. The only difference observable was, that the residuum of the British potash was different, but in whiteness and purity of colour it was the same.

The goods, when bleached and packed up, were sent as usual to the different owners. Shortly afterwards various complaints came in, stating that the goods, when unpacked and exposed to the atmosphere, lost their white colour in a very short space, and assumed different hues, according to the degree of humidity in which they happened to be placed. At first the potash was not suspected as being the cause; but after some time this was ascertained beyond all doubt. Whereupon complaints were made to the appellants, and specimens shown to Mr. Birnie of the effects of his alkali. Letters from the respondent's customers, whose clothes had been so destroyed, complaining of the bleaching, and refusing to pay their accounts, were also shown. But the appellants refused to admit that their potash was the cause, stating, that as the goods had been used, the price must be paid.

Payment of the price being refused by the respondent, action was raised by the appellants for £15. 9s. 8½d. as the price thereof, before the inferior court. In defence, it was stated, that though the British potash whitened the cloth as well as could be desired, yet, from some radical defect not discoverable at the time they were used, the cloth did not

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May 28, 1798. After a proof, the Judge Admiral pronounced this interlocutor: "Having considered the proof adduced, and the whole cause, sustains the defence, and assoilzies the defender; finds expenses due to the defender, of which allows an account to be given, and decerns."

An advocacy was brought before the Court of Session, which was raised to try the question. And at sametime the respondent brought an action of damages, for the loss sustained by her, in consequence of the defective consequences of the potash in the process of bleaching. Lord Meadowbank, Ordinary, conjoined both processes: and remitted to Dr. Black, professor of chemistry in the University of Edinburgh, to report on certain particulars. "1st. Whether he had been made acquainted with a process, by which a commodity, sold by the said Samuel Birnie and Co. as useful in bleaching, in the year 1795, under the description of British potashes, was prepared; and whether he had formed an opinion or conjecture that said commodity, from the method of preparation employed, or other causes, contained a portion of the calx of iron, by which means, or some other imperfection in its composition, it was unfit to be used in bleaching manufacture, where the end in view was to produce a pure and permanent white colour? 2d. Whether the process had been communicated and shown to him by Messrs. Birnie for his opinion? 3d. At what time? 4th. And whether he made any suggestion by which bleachers, who used the British potash, might avoid the bad consequences that would otherwise ensue from it in the colour of the goods they manufactured?"

A report was returned, showing that the appellants were made acquainted with the unfitness of their potashes for the purposes of bleaching, and that the uncrystallized sample shown contained a certain quantity of calx of lead, which made it as unfit for bleaching as if it had contained iron.

They seemed sensible of this themselves, because it was proved they had, in their second paper of directions, given out, that their potash should only be used in the first part of the process of bleaching.

May 24, 1799. The Lord Ordinary advocated the cause "at the instance of Birnie and Co., assoilzies the defender (respondent), from

"the conclusions thereof, and decerns, finds expenses due, and allows an account thereof to be given in; and in the process at the instance of Mrs. Weir, against the said Messrs. Birnie, finds damages and expenses due, and appoints her to give in a condescendence thereof, against next calling."

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On representation the Lord Ordinary adhered. And on June 12, 1799. reclaiming petition to the Court, the Lords adhered, and appointed Mrs. Weir to give in a condescendence of the damages. This condescendence having been given in, the Court restricted the claim of damages to £10. 10s., and expenses to £63. sterling.

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Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The respondent purchased the ashes in question, from the appellants at a certain price; and the transaction having been completed by delivery of the goods, she is bound to pay the price to the appellants. The sale, and the directions given as to using the potashes, were distinct, and the former could have no reference to the directions afterwards communicated to the respondent by the appellants. It has been clearly shown that these directions were perfectly proper at the time they were given. And as at that time it was the universal practice only to use the American potashes in the earlier stages of the bleaching process, in which it is admitted that the British ashes are equally fit to be used, the practice as to the American potashes, having afterwards been varied, the appellants made a corresponding variation in their directions; but they had no opportunity of communicating these new directions to the respondent, as they were not printed until after the last parcel of ashes had been transmitted to her. The appellants, at all events, acted in *bona fide*. They could not, and did not intend by their directions, to recommend the use of the British potashes in the finishing and bleaching process, because it was their interest that, in the last stages of the operation of bleaching, the salt of soda should be used. Its utility for these purposes is accordingly recommended in the paper of directions; in which its superiority over the British potashes is strongly pointed out, and, from the whole tenor of which it is perfectly evident that the appellants neither desired nor understood that the last mentioned article, viz. the British potashes, were ever to be used, except in the first stages of the bleaching process.

Pleaded for the Respondent.—The defence of the re-

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respondent has been completely established, namely, although the British potash whitened the cloth at first in the process of bleaching, yet that afterwards, when exposed to the air, it acquired sometimes a reddish and sometimes a bluish colour. These potashes, therefore, did not answer the description given, and did not produce the effects ascribed to them by the appellants. Besides, they were blameable for selling these potashes, after they were apprized by Dr. Black that it contained noxious qualities, which made it totally unfit for the purpose of bleaching. The respondent is therefore entitled to indemnification for the damages she had sustained from the effects of the ashes in question. Whatever may have been the contents of the second card of directions issued by the appellants, it is clear that the respondent only received the first paper of directions; but the fact that the second directions varied essentially from the first, is conclusive against them, as showing that they were not fit for the purpose as at first advertised.

After hearing counsel, it was

Ordered and adjudged that the interlocutors therein complained of be affirmed, with £100 costs.

For Appellants, *Wm. Adam, Ad. Gillies.*

For Respondent, *R. Dundas, J. W. Murray, M. Nolan.*

NOTE.—Unreported in the Court of Session.

THOMAS WHYTLOW, Merchant in Glasgow,	<i>Appellant;</i>
MARGARET COATS, only child and Executrix of William Coats, late Merchant in Glas- gow, deceased,	} <i>Respondent.</i>

House of Lords, 19th May 1800.

COPARTNERY—RETENTION.—It was provided in a copartnery, that on the dissolution of the concern, no division of the stock or profits should take place, until the debts due by the company, or the debts due by any of the partners to the company, should be first paid or secured. Circumstances in which it was held that certain agreements subsequently gone into by the partners, did not alter or affect this provision of the contract; and that a partner, on the dissolution of the copartnery, was entitled to withhold and refuse payment of another partner's share in the concern, until a debt due by

another company, of which he was the sole surviving partner, was paid to the dissolved concern.

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In the year 1769 James Anderson, James Whytlaw, and William Coats, the respondent's father, entered into copartnership for the purpose of carrying on trade between Glasgow and Jamaica, under the firm of Anderson, Coats, and Whytlaw. In this copartnership the parties were equal shareholders; but it was dissolved by the bankruptcy of James Anderson in 1772.

The following year a new company was established, under the firm of Coats and Whytlaw, for the same purposes, by James Whytlaw, junior, and William Coats.

1773.

In 1775, the same parties, with the addition of the appellant Thomas Whytlaw, entered into a *third* copartnership, the nature and object of which were almost the same of the two preceding. In this copartnership, which was to endure for eight years from 15th September 1774, unless previously dissolved by the death or bankruptcy of any of the partners, Mr. Coats was concerned to the extent of one half, and the appellant and his brother to the extent of one fourth each.

1775.

By one article in this contract it was provided, "That before any division of the stock or profits of the said copartnery be made, in any of the events foresaid, of death, bankruptcy, or withdrawing from the concern, or upon the final dissolution thereof, the whole debts due by the company, or the debts due by any of the partners to the company, shall be first paid or secured; and for that end each of the said parties hereby assign and convey to and in favour of one another their respective shares and portions of the stock and profits of the said joint trade, and that aye and until the foresaid debts shall be fully paid or secured."

During the subsistence of this copartnership of Anderson, Coats and Whytlaw, the appellant and one John Thomson, carried on trade in Jamaica, under the firm of Thomson and Whytlaw.

These two companies were distinct, but disposed to befriend each other. Accordingly, it was agreed, in 1769, that the company of Anderson, Coats, and Whytlaw should give credit to their friends in Jamaica to the extent of £6000, in goods to be furnished from Glasgow, in security of which the late James Whytlaw, senior, saddler in Glasgow, became bound, of same date, to guarantee his son

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Thomas Whytlow's half of such sums of money, as Thomson and Whytlow, should be deficient in paying on account of the goods so sent and commissioned from the Glasgow house, and Mr. Coats and Mr. Anderson granted a similar obligation for John Thomson.

The credit thus given, along with a correspondent guarantee, was afterwards extended by minutes entered in the books of Anderson, Coats and Whytlow, and of their successors, the two companies of Coats and Whytlow (of 1773 and 1775).

1778.

In making out accounts in 1778, it was found that a considerable sum was due by the company of Thomson and Whytlow to Anderson, Coats and Whytlow, and a still greater sum to their successors Coats and Whytlow; and on the 9th of March of that year an agreement was entered into, reciting the various connections that subsisted between the said partnerships in this country and Jamaica; and declared that the credit granted by Anderson, Coats and Whytlow, and continued by their successors, was allowed to "the said John Thomson and Thomas Whytlow, who were a company under the firm of Thomson and Whytlow;" and it then proceeded to lay down a plan for the adjustment of the claims which the said two Glasgow companies had against Thomson and Whytlow.

The provision in the agreement applicable to the old concern of Anderson, Coats and Whytlow, declared, That Mr. Coats, as being bound for John Thomson, and James Whytlow, junior, the representative of his father (James Whytlow, senior), who was bound for Thomas Whytlow, have resolved to advance to themselves, as partners of Anderson, Coats and Whytlow, or which is the same thing, to place to their debit, in the books of the company, the sum £250, on account of the Glasgow house; Mr. Thomson being liable to James for the sum thus advanced. The declaration then went on, "Therefore, and in prosecution of the said agreement, they, the said William Coats and James Whytlow, as standing partners of the said former concern of Anderson, Coats and Whytlow, and the said William Coats, James Whytlow, and Thomas Whytlow, as constituent partners of their said present concern of Coats and Whytlow, do hereby exoner and declare the said William Coats, and his heirs, executors, and successors, and the said James Whytlow, and all others the representatives of the said James Whytlow, senior, his father, respectively,

"of the foresaid obligation granted by the said James Whytlaw, senior, as security for the said Thomas Whytlaw; and of all the continuations and extensions of these obligations by the minutes of sederunt before mentioned."

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In regard to the debt or sums due by the Jamaica house to the company of Coats and Whytlaw, the deed provided that "the said William Coats, as security for the said John Thomson, and the said James Whytlaw, as come in place of his father, and security for the said Thomas Whytlaw, do hereby bind and oblige themselves severally, and their respective heirs, executors whomsoever, to advance and pay to themselves, and the said Thomas Whytlaw, as constituent partners of the company of Coats and Whytlaw, or their heirs or assignees, all such sum and sums of money as the said John Thomson and Thomas Whytlaw, in company, shall be resting or owing to the said concern of Coats and Whytlaw, as the same is or shall be ascertained by their books for goods furnished or to be furnished by them as on their credit, to the said Thomson and Whytlaw; and that at any time the same shall be demanded by any of the partners of Coats and Whytlaw, after the expiration of three months from the date hereof, provided always that the obligation before written shall extend against the said William Coats, as security for the said John Thomson, only to the extent of £2000 sterling, and consequents, and no further; and in like manner the same shall extend against the said James Whytlaw only to the like sum of £2000, and consequents thereof, and no further."

1782.

In the year 1782 the company of Thomson and Whytlaw was dissolved, and, in the course of the same year, John Thomson died, leaving that house very considerably indebted to both the companies at Glasgow of which Mr. Coats was a partner. The appellant accordingly, as the sole surviving partner of the Jamaica house, went out to Jamaica to wind up the affairs, but, in place of this, he seems to have confined himself to settling with the executor of Thomson in Jamaica, as to his share of the concern, by which he agreed to accept of £4000 as his interest in the concern, on condition of being relieved of the company debts. He also had conveyed over to him certain securities and debts in security and relief, and for payment of the debts due to the Glasgow companies.

The appellant alleged, that by mistake these appeared in

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his name alone, while, in point of fact, they were assigned direct to these companies themselves.

In 1785 an agreement was entered into, which sets forth " considering that I (Thomas Whytlow) am personally bound " for payment of the debts due by Thomson and Whytlow " and having agreed that the other debts due to the Glasgow " houses, and the sum of £4000 due to myself, should draw " and be paid proportionally from the subjects or sums for " which I obtained the aforesaid assignation (to the securities), and from any remittance that has or may be made to " us in consequence thereof. Therefore I hereby bind and " oblige myself, my heirs and executors, to communicate " and make just count and reckoning and payment to the " said companies, &c., as remittances come to my hands. The respondent's father thereby accepted of this mode of payment, but did not agree to discharge his other rights or securities for payment of these debts.

The company of Coats and Whytlow in Glasgow, having also been brought to an end, by the death of James Whytlow, the present action was brought by the appellant against Mr. Coats, for payment of £2874. 9s. with interest, as his half share of the effects of the house of Coats and Whytlow (he being entitled to one fourth in his own right, and to one fourth as in right of his deceased brother.) 2. Of £1603 7s. 9d., as the one half of the debt due by Thomson and Whytlow of Jamaica.

The defence stated to this action was, that as the company of Coats and Whytlow were creditors of Thomson and Whytlow, he, as such, was entitled to retain the sum claimed in the present action, till the just demand against the Jamaica company was satisfied and paid. This defence being coupled with the statement that the appellant owed,

- 1st. As an individual, to the concern of Coats and Whytlow, £246 13 (
- 2d. As the surviving partner of Thomson and Whytlow, he owes the same concern 3206 15 (
- 3d. Thomson and Whytlow owed the company of Anderson, Coats and Whytlow, of which the respondent's father, Mr. Coats, was the representative, 539 17 (

The Lord Ordinary (Glenlee) pronounced this interlocutor May 15, 1798. tor : " Finds that the said Thomas Whytlow, the only sur

"viving partner of the company of Thomson and Whytlaw
 "of Jamaica, and who, by certain transactions between
 "him and the executors of his deceased partner John
 "Thomson, has *inter alia* obtained securities to be made
 "over to him for the relief of the whole debts due by the
 "said company, which securities were stated by him to be
 "fully and undoubtedly adequate for that purpose, must,
 "in the present question between him and William Coats,
 "be held primarily and principally liable for, and as bound
 "to relieve the said William Coats of the debt remaining
 "due, by the company of Thomson and Whytlaw of Jamaica,
 "to the companies of Anderson, Coats, and Whytlaw, of
 "Glasgow, and Coats and Whytlaw also of Glasgow.
 "Finds that any division of the funds of the two com-
 "panies last mentioned, which at present can take place
 "between the said Mr. Whytlaw and the said Mr. Coats,
 "must proceed on the footing above mentioned; and that
 "nothing in the transactions founded on by Mr. Whyt-
 "law, entitles him to demand that the division above said
 "should take place, in the same manner as if the debts re-
 "maining due by the said company of Thomson and Whyt-
 "law of Jamaica, to the said Glasgow companies, were due
 "severally to the extent of one half by himself and Mr.
 "Coats, without Mr. Coats having relief against him; or to
 "insist that Mr. Coats in the meantime should advance his
 "share of such debt to be made part of the present fund of
 "division, and wait for his reimbursement from the securi-
 "ties already in the hands of him (Mr. Whytlaw,) or from
 "what he Mr. Coats himself may otherwise recover from
 "the estate of John Thomson."

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On reclaiming petition to the Court, this judgment was May 25, 1799.
 adhered to. And, on a second reclaiming petition, the June 5, —
 Court again adhered.

Against these interlocutors the present appeal was brought
 to the House of Lords.

Pleaded for the Appellant.—Upon the deed 23d Sept.
 1785. 1st. Under this agreement, the respondent's father,
 as the cashier of Coats and Whytlaw, received from the se-
 curities thereby agreed to be communicated, nearly one
 half of the debt due by Thomson and Whytlaw to Coats
 and Whytlaw, and of that due to Anderson, Coats, and
 Whytlaw. He, in like manner, received nearly one half of
 the debt due by John Thomson, as an individual, to Coats
 and Whytlaw, as well as of that due to himself, and of that

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due by the old Jamaica company, of Millar, Thomson, & Co. dissolved in 1769, with which the appellant had no concern. By accepting this deed, and participating under it for a period of eleven years, the respondent's father, Mr. Coats, thereby acknowledged that Coats and Whytlaw should be bound to take their payment out of the securities obtained from Thomson and Whytlaw's estate. By their acceptance of these securities, it follows that they could not resort to their personal claim against the appellant. They could not avail themselves of the one, and also resort to the other.

Upon the deed 1788. By this deed, to which the appellant was a party, the claims of Anderson, Coats, and Whytlaw, and of Coats and Whytlaw, by reason of the obligations granted by the appellant's father and Wm. Coats, are discharged, and those claims are thereby regulated in the following manner. "That each of the said William Coats and James Whytlaw was to put to his debit £250 on account of the concern of Thomson and Whytlaw in Jamaica, that is to say, to give the latter concern credit for £500, holding the said John Thomson liable to the said William Coats for one half thereof: and the said Thomas Whytlaw for the other half of the same." The manner in which the credit is given is demonstrative also of the manner in which all the other credits were given, which creates the debt which retention is now claimed. This is further proved by another clause in this agreement, whereby the respondent's father, and the appellant's brother, "bind and oblige themselves severally, and their respective heirs and executors, to advance and pay to themselves and the said Thomson and Whytlaw, as constituent partners of the company of Coats and Whytlaw, or their heirs or assignees, all such sums or sums of money as the said John Thomson and Thomas Whytlaw in company, shall be resting owing to the said concern of Coats and Whytlaw, as the same is or shall be ascertained by their books, for goods furnished, or to be furnished by them, or on their credit, to the said Thomson and Whytlaw, and that at any time the same shall be demanded by one of the partners of Coats and Whytlaw after the expiration of three months from the date of the agreement." Although therefore the appellant admits that, by the deed 1785, he is personally liable for the debt of Thomson and Whytlaw, yet he contends that by the ag-

ment of 1778 above quoted, such personal liability was discharged, at least was limited to one half of its legal extent, so that instead of being liable for the *whole* of the debt due by Thomson and Whytlaw, he is only taken bound for the one half of that debt. When, therefore, this is the result of the deed 1778, and when by the deed of agreement 1785, the company of Coats and Whytlaw became bound to take payment out of the securities, there remains no good ground in law for withholding payment of the appellant's share in the concern of Coats and Whytlaw.

Pleaded for the Respondent.—1. It is an undisputed principle of law, that every partner of a company is liable to the utmost extent of the whole debts owing by that company; and as it is acknowledged that Thomson and Whytlaw, of which the appellant is the surviving partner, are indebted to the concern of Coats and Whytlaw to a large amount, the appellant cannot be suffered to appropriate the funds of the latter to himself till that debt is paid. The effect of the plea maintained by the appellant is the reverse of the just and natural order of accounting; for his purpose is to take possession of part of the funds of Coats and Whytlaw, while his own debts, or what in law and common sense is the same thing, the debts of the company, of which he is the sole surviving partner, are still unpaid. 2. Besides, the appellant's demand is in direct repugnance to the articles of partnership, by which it was agreed that there should be no division of the stock or profits of the copartnery till the debts due by the partners to the company should be paid or secured. And by the same article Mr. Coats, under the circumstances, became vested in the appellant's share, and entitled to hold it till his debt to the partnership is fully paid and secured. 3. Further, the legal rights and obligations of the parties have not in any respect been varied by the *guarantees* originally granted, or by the *deeds* 1778 and 1785. These latter deeds applied only to the obligations of the guarantees for the house of Thomson and Whytlaw. It applied to them in a cautionary or fidejussory character merely; but did not relate, and so could not affect or destroy the obligation of the appellant, as the surviving partner of Thomson and Whytlaw, to pay the debt due by that house. But it is needless now to argue the question upon the deed 1778, because by the subsequent deeds of agreement it is that the present question comes to be decided.

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1800. The appellant's transactions alone in Jamaica with the executors of Thomson, by which he accepted and secured for himself £4000 as the amount of his own interest in that concern. And for the relief of the debts due to the Glasgow companies only obtained assignments to certain bonds and judgments held by Thomson and Whytlaw, and with a general deed of security over John Thomson's other property, does not exempt from his personal liability, but rather strengthens and confirms it. These assignments were not made over in the name of Coats and Whytlaw. They were made out in the name of Thomson, and confessedly by the deed 1785, were as much for behoof of the whole creditors of Thomson and Whytlaw, as for any one individual creditor of that concern. He went out to Jamaica to adjust and settle the company affairs. He held a power of attorney from the company of Coats and Whytlaw to obtain a settlement of their debt, and he therefore acted *pessima fide* in taking a better security for himself than he thought requisite for the large claims which Mr. Coats had against Thomson and Whytlaw. But, separately, the interlocutors appealed from go no farther than to find that any division of the funds which can at present take place must proceed on the footing of the appellant's being liable for the debts of the Jamaica house. And if the securities alluded to be as good as he represents them, then he shall, when paid, reap the benefit thereof.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be, and the same are hereby affirmed.

For the Appellant, *W. Grant, M. Nolan.*

For the Respondent, *Ar. Campbell, Wm. Alexander, Wm. Erskine*

NOTE.—Unreported in the Court of Session.

[Mor. App. Tailzie, No. 4.]

The Most Hon. HENRIETTA SCOTT, Marchioness of Titchfield, and WILLIAM HENRY CAVENDISH BENTWICK SCOTT, Marquis of Titchfield, her Husband, for his interest, } *Appellants;*

ALEXANDER PENROSE CUMMING GORDON of Altyre and Gordonston, } *Respondent.*

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House of Lords, 20th June 1800.

ENTAIL—FETTERS—INSTITUTE—HEIRS OF TAILZIE—RES JUDICATA.—(1.) Sir Robert Gordon the first, executed a strict entail to himself in liferent, and to Robert Gordon, his eldest son, and the heirs male of his body, in fee, whom failing, to a series of substitutes therein named. The entail contained prohibitions against selling, contracting debt, or altering the order of succession, fenced with irritant and resolute clauses; but these prohibitions and irritant clauses were directed only against the heirs of tailzie, and did not expressly include the institute; but it declared that the “heirs who shall happen to succeed to the said *lands and dignity*” shall not be entitled to alter. Sir Robert the second, succeeded both to the lands and the dignity or title, and by a contract of marriage, he executed a deed, by which an alteration of the succession was to take place. On his death, his son, Sir Robert the third, conceiving that, by his father’s marriage-contract, he was called to succeed as fiar, served heir of provision to him under that contract, and raised action to have it declared, that he was free from the fetters of the entail 1697, and, dying during the dependence, it was carried on by his brother, Sir William, who obtained decree in this action, and executed a new entail, by which the respondent was called to succeed, in preference to the appellant. In an action of reduction and declarator, held by the Court of Session, and affirmed in the House of Lords, that, as Sir Robert the second, was institute, and called to the fee, he was not bound by the fetters of the entail directed against the heirs of entail succeeding to the estate. 2. Also, held that a former decree was not *res judicata*, so as to foreclose the present action.

Sir Robert Gordon of Gordonston was, prior to the year 1697, unlimited proprietor of the estate of Gordonston, &c., which stood devised to “*Heredibus masculis et assignatis quibuscunque.*”

In 1697, he executed an entail of his estates, in the form of a procuratory, whereby he became bound to resign the

1697.

1800. lands for new infeftment thereof, "in favours of me, the said
 " Robert Gordon in liferent, during all the days of my life
 " time, and to Robert Gordon, my eldest lawful son, pro-
 " created betwixt me and Dame Elizabeth Dunbar, my
 " spouse, and the heirs male lawfully to be procreated of his
 " body *in fee*; which failing, to any other son lawfully to
 " be procreate of my own body, according to their order of
 " succession, and the heirs male lawfully descending of the
 " bodies of the said sons, which failing, to and in favour of
 " any person or persons, and their heirs, whom I shall name
 " design, and appoint, at any time in my life, *et etiam in*
 " *articulo mortis*, to succeed to me in my estate and dig-
 " nity, by any writ or nomination under my hand; and
 " which nomination and writ, and the provisions (if any be
 " therein contained, shall be of as great strength and effect
 " as if the same were insert herein, and in the infeftment to
 " follow hereupon; and failing such nomination, so that no
 " such writ shall happen to be extant at the time of my
 " decease, or if the same being made, shall thereafter hap-
 " pen to be revoked or innovate by me; or if the person
 " or persons so to be named and designated, shall die
 " and fail, then, and in that case, to and in favours of
 " Mrs. Jean Gordon, my eldest daughter, and to the heirs
 " male to be procreate of her body; which failing, to Mrs.
 " Margaret Gordon, my second daughter, and the heirs
 " male to be procreate of her body; which failing, to my
 " third and younger daughters procreate, or to be procreate,
 " of my own body, respective and successive in their due
 " order and age, and to the heirs male to be procreate of
 " the bodies of the said daughters; which failing, to the
 " daughters or heir-female lawfully to be procreate of the
 " body of the said Robert Gordon, my son; and failing
 " thereof, of the body of any other lawful son to be pro-
 " create by me, and the heirs male or female lawfully
 " descending of the said daughters bodies; which failing,
 " to the daughters and heirs female lawfully to be pro-
 " create of the bodies of the saids Mrs. Jean and Mrs. Mar-
 " garet Gordons, my eldest and second daughters; and,
 " failing thereof, of my third and younger daughters, (of
 " whom the appellant's predecessor, Miss Lucy Gordon,
 " was one,) and the heirs whatsoever, descending of such
 " females—the elder daughter in the respective cases above
 " being always preferred to the younger succeeding with-
 " out division," (whom failing to certain other substitutes).

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It was provided and declared in this entail, "That it shall be noways leisome nor lawful to the *heirs of tailzie above designed, male or female*, nor the heirs who shall happen to succeed to the said lands and dignity, to alter, infringe, or break the said tailzie and destination, nor the order and course of succession above written; nor yet to give, grant, sell, annalzie, or dispoise irredeemably, nor wadset, nor dispoise under reversion any of the baronies above named." It further declared, "It being understood, that though the forenamed persons be designed heirs of tailzie, and be to succeed to my said estate as such, yet they shall have no further power to affect and burden the same nor if they were liferenters."

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These prohibitions were fenced with proper irritant and resolute clauses, directed in terms as above against the heirs of entail. This entail was duly recorded. Although the maker had reserved power to himself to alter, yet he never did this, and died in 1704, whereupon he was succeeded by his son, Sir Robert the second.

The son took possession of the estate, not by service as heir to his father, but as *fiar* and dispoinee under the disposition and infestment in the entail. Under this title, he possessed for seventy years.

He married, in 1734, Mrs. Agnes Maxwell; and, in contemplation of that marriage, bound and obliged "himself to provide, secure, and resign the whole lands and estate enumerated in the said bond of tailzie, which are holden as repeated herein *brevitatis causa*, and all other lands and estates now pertaining and belonging to him, and that to and in favour of himself, and the heirs male of this present marriage; which failing, the heirs male of his own body of any other subsequent marriage; which failing, to such person or persons, as he by a writ to be subscribed by him, at any time of his life, shall nominate and appoint to succeed to him in his said lands and estate, and if no such nomination of successors shall be made, or if made, and afterwards revoked, then in favour of the heirs male and of tailzie, substitutes and successors mentioned in the said bond of tailzie, made and granted by the said deceased Sir Robert Gordon of Gordonston.

1734.

Sir Robert Gordon the second, never executed any other deed in terms of the above obligation altering the order of succession. On the contrary, in granting subsequently a bond of provision, he refers to his father's entail of 1697,

1800. and declared, " That it is my intention that the entail, date
 " 26th day of January 1697 years, made and granted by th
 MARCHIONESS " deceased, Sir Robert Gordon, my father, be, and continu
 OF " the rule of succession to the said lands and estate." H
 TITCHFIELD " died in 1772, leaving two sons, Robert and William.
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Sir Robert the third, imagining that he succeeded t
 the estates in fee simple, in virtue of the clause in h
 father's marriage contract, expedie a general service as he
 of provision under that contract. He raised an action, t
 have it declared that he was free from the fetters of th
 entail. By agreement with him, Mrs. Hay appeared, an
 gave in, as was stated, a pretended defence. He obtaine
 decree setting aside the entail 1697, of this date. Sir Ro
 bert the third died during the dependence of this action
 without issue. It was then carried on to a conclusion b
 his brother, Sir William.

July 10, 1777.

In 1781, Sir William Gordon executed a new entail, " t
 " myself, and the heirs male of my body ; whom failing
 " to the heirs whatsoever of the body of the heir male of m
 " body who shall die last infest in, and in possession of m
 " said lands and estate ; whom failing, to the heirs whatso
 " ever of my own body ; whom failing, to any person o
 " persons that shall be nominated and called to the succee
 " sion by a writing under my hand, at any time in my life
 " *et etiam in articulo mortis* ; and, failing of such nomina
 " tion, to and in favour of David Scott of Scotstarvet, eld
 " est lawful son of the deceased David Scott of Scotstarvet
 " by Mrs. Lucy Gordon, and other substitutes ; whom fail
 " ing, to Alexander Penrose Cumming of Altyre," &c.

The appellant was heir of line, and heir of tailzie and pro
 vision under the entail of 1697, executed by Sir Robert
 Gordon the first ; and she brought the present action of
 reduction to set aside the entail executed in 1781 by Sir
 William Gordon, as *ultra vires* of the maker, and a contra
 vention of the previous entail and investitures of the estate
 of 1697. The decree in 1777 was also sought to be set
 aside—the action being brought against the respondent, the
 substitute next entitled to succeed by the entail, executed
 by William last above quoted, in consequence of the failure
 of all the previous heirs substitute of entail. The defence
 stated to the action was, 1. That Sir Robert *the second*
 being fiar and institute by the entail 1697, was not bound by
 the fetters of that entail, directed against the heirs of tailzie
 only ; and, therefore, that he and his heirs had full power

to dispose of the estate as they thought fit. 2. That, by a previous judgment of the Court, in the same question, the matter was now *res judicata*.

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Jan. 28, 1797.
Jan. 19, 1798.

The Lord Ordinary (Swinton), of this date, pronounced this interlocutor, "Repels the reasons of reduction, assoilzies the defender, and decerns." On reclaiming petition to the whole Court, "The Lords repelled the defence of *res judicata* stated for the respondent; but sustain the other defences, adhere to the interlocutor complained against, and refuse the desire of the petition.

A second reclaiming petition was presented, but refused; and the former judgment adhered to.

Against these interlocutors the present appeal was brought by the Marchioness of Titchfield and her husband, the respondent, on his part, acquiescing in that part of the interlocutor in regard to the *res judicata*.

Pleaded for the Appellants.—1. This is not a question with creditors or purchasers, who are objects of favour, but between donees, in which case the will of the donor ought to decide, unless it is controlled by precedents. The precedents referred to by the respondent, it is submitted, do not apply to this case, as there are special circumstances which exclude them. The entail applies to the title of honour as well as to the lands. Supposing, therefore, Sir Robert the second was a mere institute or disponent under the entail, yet, as he was heir in the title, the limitations which include that title must be held to include him. This is apparent from the entail itself, because it declares, that "the heirs who shall happen to succeed to the said lands and dignity," are prohibited from altering the tailzie. Sir Robert the

Leslie v. Fin-
drassie, 1752.
Erskine v.
Hay Balfour,
Edmonstone v.
Edmonstone,
1769, M. p.
4409.
Menzie v.
Menzie, 1785,
M. 15436.
Wellwood v.
Wellwood,
1791, M.
15463.

second therefore fell, by the express terms of the entail, within the fetters thereof, which was farther evidenced by the clause, prohibiting "the forenamed persons from having more power than simple liferenters." 2. But, assuming that Robert the second was not bound by the fetters of the entail, he not being an heir of tailzie, but institute under the entail, and had full power to alter it, the appellants do with confidence maintain, that he neither did alter, nor ever entertained any intention of doing so. On the contrary, it is clearly shown by the bond of provision above referred to, executed by him before his death, and which refers to his father's entail of 1697, that it was his intention that that entail should regulate the succession to

1800. the estate of Gordonstoun. He therefore never altered that order of succession. His marriage contract of 1734 cannot be held as an alteration of that entail, because it is not absolute but conditional. It proceeds on an uncertainty, and sets forth, "*in case the said Sir Robert Gordon shall at any time hereafter think fit*, or that it shall be in his power "to alter, innovate, and change, or to reduce and set aside the present rights, &c., then he binds and obliges to provide and secure the estate," &c. But this is not an actual alteration of the entail. It is only an obligation to secure the succession in a certain event, namely, if he had powers to alter. No declarator of this power to alter followed this, and no deed thereafter, altering in terms of that obligation, was ever executed. It is clear, he never *thought fit* to alter, and never imagined that his marriage-contract of 1734 was itself an alteration, because the bond of provision subsequently granted, which refers in express terms to his father's entail of 1697, confirms the order of succession therein, and declares that it is his intention that this entail should be the rule of succession to the estate. And the fact of his having lived forty years after executing his marriage contract, and dying without doing anything by word or by deed, to alter that entail, goes to corroborate this meaning of the contract.

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Pleaded for the Respondent.—1. Sir Robert Gordon the second, being institute or disponent, and not an heir of entail, by the conception of the tailzie 1697, was not bound by the fetters and limitations thereof, and, consequently, the prohibitive, irritant, and resolute clauses, could not affect him, or restrain his rights as far: And having in him an unlimited fee in the estate of Gordonstoun, he was entitled to dispose of it at pleasure. 2. Sir Robert Gordon the second, accordingly, by his marriage-contract of 1734, did effectually settle the said estate upon the heirs male of the marriage, without any restraint or limitation whatever; and Sir William Gordon, who, by the death of his elder brother, Sir Robert the third, had succeeded, became, as heir male of the marriage, creditor under the obligation in his father's marriage-contract, and was therefore entitled, and did take up the succession to the said estate, as heir of provision under his father's contract, and so was entitled to make the entail of 1781, under which the respondent is entitled to succeed to the estate.

After hearing counsel,

The LORD CHANCELLOR LOUGHBOROUGH said,

" My Lords,

" Though I do not rise to move your Lordships to reverse the interlocutors complained of by this appeal, yet, as the cause has been argued with much anxiety, I think it my duty to state the reasons which influence the judgment which I have formed upon it.

" The question takes its rise on a contract of marriage, which is not conceived in the most accurate and precise terms. There is no clear or marked difference, between what is matter of recital, and what is matter of settlement. The rule of every Court, in such a case, is to view the situation of the parties who enter into the contract.

" In this contract, it is impossible not to be convinced, that the friends of the lady wished to give the most ample provision for the support and dignity of an ancient family, to the heir of the marriage. It is stated that the fortune of the lady was small; but that is of little importance; it was not an unequal match. The lady was of a family as respectable as her husband's, and it was the duty of her friends to attend to this, that the children should be duly provided for.

" Taking it then for granted, that it was the object of them, as well as of Sir Robert, to provide his estates to the children. We may enquire into the situation of his property. The largest part of his estate was held under an entail made by his father. By that deed, Sir Robert was provided to the fee of the estate, and he never made up titles as representing his father in it. The entail was very strict and binding on all the parties who might be bound by it; they were prevented from contracting debts to bind the estate, and from making conveyances of it, under an irritancy which carried it to the next heir of entail.

" This was the conception of the entail, but, by giving Sir Robert the fee, these prohibitions only affected the subsequent heirs, and did not attach upon Sir Robert. Under this entail, all the debts contracted by him would have been effectual against this estate,—he might have sold every acre of it, and a pursuit after the price, was all the remedy that was competent to his children.

" In these circumstances, it was incumbent on those treating, to secure the estate for the children. I should have observed, that Sir Robert also possessed an unentailed estate of smaller value; and it was the object of Sir Robert, that all his estates, both entailed and unentailed, should go to the heir male of the marriage,—as it was of all the parties, that such heir should have as ample an estate as possible. The mode of settling such estates upon children in Scotland, is not by reducing the father to a liferent, but by giving the children what is termed a *jus crediti* in the estate. By this settlement, it is clear, (as is stated in the decree of 1777,) the heir of the marriage was entitled to take the unentailed estate in fee simple.

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"As to the entailed estate, (and whether the entail was binding at all or not, is, I think, doubtful, historically speaking), if the entail was binding upon Sir Robert, nothing more could be done; the children would be entitled to take the estate under it. But, if not binding, the right of the heir might be affected in two ways. He might make an alteration of the settlement, and this, whether he had the power to do it or not; but, 2dly. If he was not bound by the fetter of the entail, all his debts were charges upon the estate, or he might have sold it; and though he had allowed the estate to go by the entail, it might have been so burdened as to disappoint the provision of the heir.

"It was therefore necessary to make a settlement to provide for both these cases. If Sir Robert makes any alteration, the heir male shall have right, or, if to his prejudice, he shall have right to set aside upon that contract. For this purpose, there was a covenant for an action in implement to be brought by a trustee in Sir Robert's lifetime, or by the son after the father's death. Therefore it was provided that if there was to be any alteration at all, it should be to leave the heir the fee of the estate.

"In the other case, the estate might be unentailed as to Sir Robert, as in fact it was, yet if he had a right to charge it with debts, the succession might prove very barren. He covenanted, therefore, in that event, that the estate shall be provided to the heirs male of the marriage. This supposes that the entail should stand, but that Sir Robert was free from its fetters.

"I am therefore of opinion, that the clause is correctly drawn in the disjunctive, as referring to two different cases, which were perfectly distinct. This struck me so forcibly from the beginning, that if it had been put in the conjunctive, it would have been more reasonable to change the *and* into *or*, than to adopt the appellants' construction.

"The appellants' argument supposes, that if Sir Robert had not chosen to alter, that the settlement should remain upon the entail. But a court of law would be more apt to suppose that there was a mistake in the terms of such a covenant, than that it should strain other words, to adopt a conclusion which was to make the whole contract necessary. There was but one settlement of both estates, and if Sir Robert was to settle his estates upon his children, only if he should choose so to settle them, the children were left without any security whatever.

"I therefore concur with the judgment of the Court below, and move your Lordships that the decree be affirmed."

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellants, *W. Grant, Wm. Adam.*

For Respondent, *Robert Blair, Chas. Hope, Wm. Alexander.*

[M. App. Jurisdiction, No. 7.]

1800.

The Right Hon. JOHN EARL OF GALLOWAY,	}	<i>Appellants;</i>	EARL OF GALLOWAY, &c.
and JOHN GORDON, Esq., - - -			
The Lords COMMISSIONERS of his Majesty's	}	<i>Respondents.</i>	COMMISSIONERS OF HIS MAJESTY'S TREASURY, &c.
Treasury, and His Majesty's Advocate,			

House of Lords, 15th July 1800.

JURISDICTION—LIS ALIBI PENDENS—CAUTIONARY OBLIGATION.—

Two cautioners became bound in a bond to the crown, for the Receiver General of Land Tax, &c., for the time being. Thereafter the additional duty was imposed upon this office, of receiving the Court of Session money, which increased materially the pecuniary responsibility of the Receiver's office. He died largely indebted to the crown. An action was raised in the Court of Session of constitution, with the view of leading an adjudication against the deceased's land estate, pending an action in the Court of Exchequer for the same sum. The cautioners objected to the competency of this action, both because the Court of Exchequer was the proper jurisdiction, and also because, in that Court, an action was already pending for payment. They further contended that their bond could not cover the money deficiencies of the Court of Session—the duties of this department having been conferred on him after the date of their bond, and without their consent. Held that there was no *lis alibi pendens* here, and that the Court of Session had jurisdiction, to the effect of giving a decree of constitution, for the purpose of raising adjudication against the land estate in Scotland; but, in the House of Lords, the case was remitted, to consider to what extent the cautioners were liable for the Court of Session money under their bond.

Admiral Keith Stewart was Receiver General of the land tax, &c. in Scotland; and having, on his death, been indebted to the crown in a large balance, the present action of constitution was raised against his son, as his representative, along with the admiral's cautioners, chiefly with the view of making a decree of constitution the foundation of raising an adjudication, and proceeding against Admiral Keith Stewart's land estate in Scotland. The bond or instrument which he had signed along with his cautioners was executed by Scotsmen, and in Scotland; and after the date of the bond, additional duties of collection had been conferred upon him, increasing materially the pecuniary responsibility of his office, viz. the Court of Session money.

The cautioners did not deny liability for any deficiencies falling under the proper duties of Receiver General at the

1800. time they granted the bond. And the present question, accordingly, had reference only to the additional duty subsequently imposed, and which increased materially the pecuniary responsibilities of the office.

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TREASURY, &c. In defence, it was stated, 1st. That action did not lie for a debt due to the crown, in the Court of Session, but only by a suit in the Court of Exchequer, which had exclusive jurisdiction conferred on it, in terms of the act 6 Anne, c. 26. 2d. That action for the same debt was actually depending, at the suit of the king, in the Court of Exchequer, against the same defenders; and, 3d. For the cautioners, That the obligation undertaken by them did not apply to, and was not intended to cover the money deficiencies in question,—viz. the Court of Session money—the care and receipt of that department having been committed to him after the date of their bond.

June 9, 1799. The Lord Ordinary pronounced this interlocutor, finding, “ that by the law of Scotland, and also by the act 6th of “ Queen Anne, c. 26, this Court is alone competent to the “ trial of any question concerning, or any claim brought a- “ gainst the heritable estate of a debtor to the crown, and “ in respect the pursuers’ counsel have limited the conclu- “ sions of their action to a *decree of constitution*, in order to “ found an adjudication of their debtor’s heritable estate, “ and that the defenders have not shown that they have yet “ paid or accounted for the sums claimed by the pursuers, “ decerns against them conjunctly and severally for the “ sums, principal and interest, as libelled, reserving all ex- “ ceptions *contra executionem*; and as despatch is said to be “ the object of the pursuers, as delay is alleged to be the “ object of the defenders, and as the Lord Ordinary has “ bestowed all the attention in his power, dispenses with “ any further representation, and allows the defenders to “ apply to the whole Lords.” A representation was not-

July 11, 1799. withstanding given in, whereupon the Lord Ordinary adhered to his former interlocutor. On reclaiming petition to the whole Court, the Lord Ordinary’s interlocutor was adhered to.

Against these interlocutors the present appeal was brought by the cautioners of Admiral Keith Stewart only.

Pleaded for the Appellants.—The appellants’ obligation, which is the sole foundation of a demand on them, neither in terms nor in spirit comprehends or extends to the Court of Session money, which came into the hands of Mr. Stewart (i-

it ever did, for there is no evidence of the fact) long after his appointment to be Receiver General, and after the date of the obligation by him and his sureties, not in the usual course of office, but in pursuance of a special act of parliament, directing that this money should be paid to the Receiver General of His Majesty's land rents, to be by him remitted to the Exchequer in England. The condition of the obligation is, that Mr. Stewart shall, out of the land rent and casualties received by him, and out of such monies as shall be impressed or directed to be paid into his hands by the Barons of Exchequer in Scotland, or by warrants under the royal sign manual or otherwise, pay all such sums as the said Barons shall direct. Such is the whole contents of the instrument that relates to the receipt and payment of the money for which Mr. Stewart and his sureties became engaged by the tenor of that obligation; and at once shows that it can have no relation to the money in question. Nor do the general words "that the said Keith Stewart *shall well and truly exercise the office during the time he shall continue in the same*; and that he shall annually account to the Barons of the Court of Exchequer for all monies received on their account," comprehend the sums in question, because this would be extending the sureties' obligation further than is warranted by a fair construction of their bond. The cautioners' bond could have only reference to the duties of Receiver General as exercised by this officer at the date thereof. None else were in contemplation, and no additional duty afterwards conferred, increasing materially the pecuniary responsibility of the office, can be embraced under their obligation, unless the consent of the sureties was obtained thereto. The general clause above alluded to, is followed by a particular enumeration of the matters intended to be covered by their obligation; and it being the rule of law, that such general clause, followed by an enumeration of particulars, is always qualified by these particulars, and cannot be extended beyond them; and as law allows cautionary obligations to be strictly interpreted, it follows, that the additional duty afterwards conferred on this office, with its accompanying increased pecuniary responsibility, cannot be held in law to fall under the obligation come under by the cautioners. That obligation only reached the matters specially enumerated, and that this was the sense in which their obligation was viewed by the officers of state themselves, was clearly shown by their demanding fresh

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1800. bonds and sureties whenever the branch of revenue was committed to his collection and control. But, 2d. Supposing the cautioners liable for the money in question, under their bond, yet, according to the true nature and just construction of that bond, the present suit was competent only in the Exchequer Court. This is clearly established by the act 6 Anne, c. 26, § 7 of which enacts, that all suits for any "revenue, rents, duties, accounts, profits, or other things" "accruing to the Queen's Majesty within Scotland, or which" "shall any wise concern or relate thereto; or any officers, ministers, or accountants of," "shall be in the said Court of Exchequer in Scotland;" and even if this statute were not positive and express, which it undoubtedly is, still the nature of the case shows, that the obligee in such an instrument can only be sued in the Court of Exchequer. 3d. Supposing it to be perfectly competent for the crown to bring the action before either court, yet it is against all law and justice to bring a suit in both courts against the same parties, and at the same time.

Pleaded for the Respondents.—1st. The necessity of the present suit before the Court of Session, while another is pending before the Court of Exchequer, and the apparent objections to such a course, and to the competency of the jurisdiction, at once disappear, when due consideration is had to the explanation set forth in the summons,—namely, that the object by it was, to obtain decree in order to ground an adjudication, and to proceed against the heritable estate of the debtor. And this appears more necessary, when it is expressly provided by the 6 Anne, c. 26, quoted by the appellants, that "no debt or duty from any of the debtors or accomptants of the crown in Scotland, shall affect or subject any real estate in Scotland of any such debt or accountant"—"and that the law of Scotland shall, in all such cases, and for such purposes, hold place and be observed." The present action being brought for the purpose of attaching, by adjudication, the real estate of the appellants, the objection to the competency of the Court of Session is obviously ill founded. It has been so found in many cases, particularly in a much stronger case than the present, *Creditors of Burnet v. Murray*, 17th July 1754, where the Court, without obliging the officers of the crown, as the respondents have, for the sake of more accuracy, done in this case, to apply for and obtain a previous decree of constitution, adjudged the estate of the crown debtor at —

Vide ante Vol. I., p. 594.
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once, upon the simple production of the bond executed by the crown debtor in the English form. And the same was the case of His Majesty's Advocate and the Receiver General of the Customs *v.* Foggo (1752) by decree of adjudication and action of mails and duties. But, 2d. In regard to the objection of *lis alibi pendens*, in respect to the writs of *scire facias* depending in Exchequer, it is sufficient to say, that this is entirely founded in a complete misapprehension of the rule of law, which is inapplicable to the present case. When two courts have each a jurisdiction in the same matter, justice will not admit of a party vexatiously to prosecute two actions of the self same kind, and to the same effect in each : he must choose one and abandon the other. But, in the present case, the actions depending in the two courts are in their nature entirely different. They relate to different subjects, and have different purposes in view. Unless the crown prosecuted *simul et semel* in both, its remedy would not be complete ; and, by succeeding in both actions, it is only in the end placed in the same situation it would have been in by a proper suit maintained in the Court of Exchequer in England ; or, as if the question had occurred before the Union, by the proper action before the Court of Session. The treaty of Union, and the act 6 Queen Anne, compel the crown, in recovering its debts, to divide its suits between the Court of Session and Exchequer. When personal estates and effects are the objects of the suit, it is in the Court of Exchequer where satisfaction can alone be had. But when the real estate is to be attached, the crown must, like any other private creditor, adjudge the estate, inhibit, or bring the estate to judicial sale in the Court of Session. In such case, there is no room for the plea *lis alibi pendens*. The *scire facias* in the Exchequer Court is the beginning of a diligence against the moveable estate of the debtor. If there is none such, it does not and cannot foreclose the crown from proceeding against the heritable estate in the manner which alone the law permits proceedings against such estate, in order to acquire that preference which is the aim of both suits. The object therefore of the one suit is different from the other. They are different in their nature and effect, and both together form one entire remedy. 3d. It is a plain misconstruction of the bond and obligation of the sureties, to contend that these sureties only became sureties for the office of Receiver General, as at the date of their obligation, at which time he had no concern with the Court of Session

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1801. fund ; because the obligation undertaken by them is general and is, that Admiral Keith Stewart should faithfully execute the office of Receiver General, and contains this express provision, “ that the said Keith Stewart shall well and truly “ execute the said office, by himself or his sufficient deputy “ or deputies, for whom he hereby declares himself answer- “ able for, and during the time he shall continue in the said “ office.” Thus the obligation as surety for the office, extends without limitation to the whole time that he shall continue to exercise such office. This being the general and leading feature, the sense and meaning of the sureties’ obligation, it cannot be limited in any degree by the enumeration of particulars which follow it, because the particulars do not affect the general obligation, to “ well and truly exercise the said office, so long as he held the same.”

After hearing counsel, it was

Ordered and adjudged, That the cause be remitted* back to the Court of Session in Scotland, to consider whether the sureties in the bond of September 1784 are liable and to what amount, in this proceeding, on account of the fund of the Court of Session received by the late Admiral Stewart.

For Appellants, *Wm. Adam, Wm. Erskine.*

For Respondents, *J. Mitford, R. Dundas, Wm. Grant, J. Abercrombie.*

* No further trace of this case in the reports.

[2 Bell’s Leases 101-2. Note, Hunter, p. 766.]

JOHN MACMICHAN, Esq. of Balmae, *Appellant*
THOMAS HUTCHESON, Tenant in Corbieton, *Respondent*

House of Lords, 5th May 1801.

LEASE—CLAUSE—WAY-GOING CROP.—A tenant entered into lease of a farm at Whitsunday 1791, without any right to a grass crop at his entry. A clause in his lease provided, that if the estate was sold, there was to be a liberty of break in the lease after seven years, if the purchaser wished to enter and take possession ; upon which event, the tenant was to receive a full year’s rent on leaving the farm, for defraying the expense of sowing out the lands the year in tillage, with grass seed and clover, and in consideration leaving the whole lands in grass, and removing at Whitsunday. Nothing was said about a way-going grain crop. In the Court

Session, held the tenant entitled to a way-going grain crop ;
Reversed in the House of Lords.

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The lands of Corbieton, situated in Kirkcudbright, belonged to William Riddock, and were let on lease by his trustees, extending to 247 Scots acres, together with the mansion house, offices, and garden, for the space of twenty-one years from and after Whitsunday 1791, at a yearly rent of £192, payable half yearly.

The tenant was taken bound to have part of the lands in tillage every year during the currency of the lease. He had also power to give up the lease seven years after the commencement of the same, on giving a year's notice to the landlord. And the landlord, on his part, had a similar stipulation as to a break in the lease, upon which the present question arises. The clause as to him ran thus : " That in case the said William Riddock, or his foresaids, shall think proper, or find it necessary to sell his estate of Corbieton, and that the purchaser shall incline to reassume the possession of the lands, and others hereby let, it shall be in his power so to do, at the period of seven years from the commencement of this lease, or at any term of Whitsunday thereafter, during the currency hereof, upon making due and lawful intimation of such his intention, to the said Thomas Hutcheson and John Fead, or their fore-saids, by a notary public before witnesses, at least one year previous thereto, and allowing to the said tenants one full year's rent for defraying the expense of sowing out the lands that year in tillage, with grass seeds and clover, and in consideration of leaving the whole lands in grass, and removing from the same at a term of Whitsunday."

Under this contract, the respondent, Hutcheson, entered into possession, but Fead, his co-lessee renounced. He entered at Whitsunday 1791, without any right to a grain crop at entering, and so he could not reap any such crop until harvest 1792, although the full year's rent was made payable at Whitsunday 1792, some three or four months previously. Apart, therefore, from the stipulations of the lease, it was alleged, that at the termination of the lease he was entitled to a way-going crop.

The estate was sold to the appellant in 1799, that is, more than seven years after the commencement of the lease, and the purchaser, in terms of the above clause, gave notarial intimation on the 1st of April 1800, signifying his reso-

1801. lution to take possession of the whole premises let at Whitsunday 1801; and further signifying his willingness to allow the tenant, in terms of the covenant, one full year's rent for defraying the expense of sowing out the lands in tillage for the crop 1800, with grass seeds and clover, and in consideration of his leaving the whole farm in grass, and removing at Whitsunday. By the same notice, he required the tenant to sow the lands under tillage that season with grass seeds, so that the whole farm might be in grass at Whitsunday 1801, otherwise that he should be liable in damages, &c.

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The question was, Whether the tenant was entitled to a way-going grain crop, as well as to the full year's rent, in consideration of giving up the lease before the expiry of the same; and what was the true interpretation of the lease on that subject?

In advocations of a judgment by the Steward of Kirckdubright, pronounced in a removing and interdict against the tenant's remaining on the lands, and against his ploughing for way-going crop, the Lord Ordinary conjoined the two advocations, and pronounced this interlocutor: "Having heard parties, and considered the lease founded on, which provides and declares, that in case the said William Riddock, or his foresaids, shall think proper, or find it necessary to sell the estate of Corbieton, and that the purchaser should incline to reassume the possession of the lands and others thereby let, it should be in his power so to do at the period of seven years from the commencement of the said lease, or at any term of Whitsunday thereafter, during the currency thereof, upon making due and lawful intimation of such his intention to the said Thomas Hutcheson and John Fead, or their foresaids, by a notary public, before witnesses, at least one year previous thereto, and allowing to the said tenants one full year's rent for defraying the expenses of sowing out the lands that year in tillage with grass seeds and clover, and in consideration of their leaving the whole lands in grass, and removing from the same at the term of Whitsunday, advocates the cause, continues the interdict pronounced by the steward-depute, against ploughing and sowing, superseding the consideration of damages or expenses claimed by the landlord in respect of ploughing done by the tenant this season, until the point of interdict shall become final."

Dec. 19, 1800.

On reclaiming petition, the Court altered, removed the interdict, and decerned. On reclaiming petition by the appellant, the Court adhered.

Against these two interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The question is, Whether, with reference to the particular contract between the parties, the tenant is at liberty to plough and sow the ground prior to the Whitsunday of his leaving, so as to reap the “crop posterior to that Whitsunday,” at the season when it is usually reaped? The tenant contends, that by this special contract, he is so entitled to plough, sow, and reap; that, apart from such contract, he would have been so entitled, and that this lease does not infringe on, or alter that rule in any degree. But, in the appellant’s apprehension, it is perfectly clear that the parties, by their contract of lease, meant to prevent the very thing contended for by the respondent, namely, a way-going crop, and hence the express stipulation for possession on the part of the landlord at Whitsunday, for which he was to get a full year’s rent, as “a consideration of leaving the whole lands in grass, and removing at a term of Whitsunday.” The very expression, to leave the whole lands in grass at the Whitsunday of leaving, is utterly repugnant with the idea of any right to plough the tillage land; but the tillage land in that year was to be sown and turned into grass according to the express agreement. Nor was this stipulation of leaving at Whitsunday in these circumstances agreed to without full and adequate consideration. On the contrary, the payment of a full year’s rent was to be given, but what the respondent wants here, is both payment of the full year’s rent, and a way-going crop at same time.

Pleaded for the Respondent.—1. In the construction of contracts or deeds, the rule is, that a doubtful clause is to be interpreted most strongly against him in whose favour it has been introduced. 2. It is to be interpreted so as to give effect to the whole clause, and not merely to detached parts of it. And, 3. In such a manner that the effect of the clause may be upon the whole reasonable and just, and as near as can be to the probable intention of the parties. On all these grounds the interlocutors appealed from are well founded.

The clause was in favour of the landlord, and ought to have been more clear and unambiguous. The clause is not so framed. It is confused and imperfectly expressed, owing

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1801. to the ignorance of the framer, who was not aware, that order to exclude the respondent's right to a way-gate crop, such must be expressly inserted in the contract.

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HUTCHESON. appellant's construction of the contract rests upon a loose and general words near the end of the clause, and in opposition to the plain meaning of the whole. The right of putting an end to the lease is not to be enforced at the middle of a year, but "at the period of seven years from the commencement of the lease, or at any term of Whitsun thereafter." He is to give an allowance of a full year's rent, which implies that the respondent was to have full year's possession without payment of rent; and conditions which follow are intended merely as a burden upon this premium. The appellant's construction would, in these circumstances, be manifestly unjust, because it necessarily implies that the tenant was to get no consideration whatever for being deprived of the lease during the currency thereof, and when he wished to retain it. And the only consideration he was to get, was that for allowing the landlord possession to the whole lands sooner than he was otherwise entitled. In short, according to his argument, he is not only to renounce his lease, but to suffer a loss besides. He is to be at the expense of purchasing and sowing grass seeds and clover for eighty acres. His case is to suffer the injury which the sowing of clover and grass seeds at an improper season must occasion. In addition, during the last year of his lease, he is to lose the use of one third, and by far the most valuable part of the lands, for which he could at any time receive a sum equal near to three rents of the whole. But the respondent maintains that law will never impose such an unjust construction upon the present contract.

After hearing counsel,

It was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby *reversed*.

For Appellant, *William Adam, William Erskine.*

For Respondent, *Rob. Craigie, John Clerk.*

NOTE.—It was observed on the Bench, in the Court of Session, that the notice to quit was, for a year, too early; that notice in April 1802 should have been for Whitsunday 1802, and thereby full time allowed for laying down the lands in grass.

(Bargany Cause, M. 11171.)

1801.

The Hon. MARIANNE MACKAY, otherwise FULLERTON, Wife of Colonel Wm. FULLERTON of Fullerton, and the said Wm. FULLERTON for his interest, } *Appellants;*
 SIR HEW DALRYMPLE HAMILTON of North Berwick and Bargany, Bart., Eldest Son and Heir of SIR HEW HAMILTON DALRYMPLE, Bart., lately deceased, } *Respondent.*

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&c.
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House of Lords, 3d June 1801.

ENTAIL—CONTRAVENTION—HEIR-APPARENT—DECLARATOR OF IRRITANCY—PRESCRIPTION—MINORITY—PROCESS.—A reduction of the title, and a declarator of irritancy of an entail, were brought fifty years after the alleged irritancy and contravention, founded on the allegation that the order of succession of the entail had been inverted and changed by an heir substitute of entail, who had possessed the estate on apparency for many years, and had then denuded in favour of the next heir of entail, in order to comply with the conditions of another tailzied estate to which he had succeeded. The defence stated to the action, *inter alia*, was, that the defender held a prescriptive title, which excluded the action. The Court of Session, on resuming the remit from the House of Lords, altered their former interlocutor,* and found, that the defender had produced a sufficient prescriptive title to exclude. In pronouncing this judgment, the Court were unanimous on the first point, viz.—1. That no contravention had been committed, and consequently, that she was not the nearest heir-substitute of entail. 2. A majority found, that if the acts of contravention alleged by her had amounted to a contravention, it was purgeable, and had been purged. 3. That an heir-apparent in possession, was not legally capable of committing an act of contravention. 4. That an action of declarator of irritancy was necessary, but not competent after the contravener's death; and, 5. As to the plea of minority, as an exception to the positive prescription, six of their Lordships held, that the minority of an heir-substitute of entail, whether the nearest or most remote, could not be deducted. Others were for de-

* In pronouncing this previous interlocutor, there were eight judges against five; and, from the notes of the opinions taken by one of the judges in the Compiler's possession, they decided the question of minority, upon this hypothesis, that if Mrs. Fullerton was *next substitute of entail*, she was entitled to deduct her minority. Among the judges who dissented from this proposition, that a first substitute heir of entail is entitled to deduct minority, were Lord Justice Clerk M'Queen, Lord Meadowbank, Lord President Campbell, and Lord Glenlee.

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ducting the minority of the *first* heir substitute, and some deducting the minority of the whole heirs-substitute of entail. In the House of Lords, the interlocutor was reversed, the effect of substituting another, specially stating the ground upon which the reversal proceeded, namely, that the matters stated by the pursuer in her summonses were not relevant to support the conclusions therein, and assoilizing the defenders. The second summons, which had in view to declare the irritancy, and which was raised at the same time with the other, had been allowed to stand over; but, after the decision in the Court of Session, and the former appeal to the House of Lords, it was sought to be conjoined with that case remitted for consideration. This was refused, as incompetent *in hoc statu*.

In the report at p. 631 of vol. iii. the circumstances which gave rise to this case are fully detailed.

It is there seen how, by the marriage of Sir Robert Dalrymple, Bart. of Castletown, (eldest son of Sir Hew Dalrymple of North Berwick, Lord President of the Court of Session) with Joanna Hamilton, the only daughter of John, Master of Bargany, who was eldest son of the second Lord Bargany, the estates of the latter came to merge in the Dalrymples of North Berwick.

1688. It was there stated, that in 1688 Lord Bargany had made a tailzie, by which he limited the estate of Bargany to his eldest son, John Master of Bargany, and the heirs male of his body; whom failing to William, his second son, and the heirs male of his body; whom failing to the heirs male to be procreated of his own body; whom failing, to the eldest heir female of his own body, and the descendants of his body without division.

It has also been seen that this entail contained a prohibition, secured by clauses irritant and resolute, against alienation of the estate, and alteration, innovation, or change of the order and course of succession which is there prescribed, and an injunction that the heir in possession should assume the surname, addition, and armorial bearings of Hamilton Bargany.

Under this tailzie, no feudal investiture was ever made by John Master of Bargany. He died before his father, leaving an only daughter, Joanna Hamilton, married, as above mentioned, to Sir Robert Dalrymple of Castletown.

In consequence of the death of John, Master of Bargany, William, the second son of Lord John Bargany, succeeded in virtue of the above limitation in the entail, and became third Lord Bargany. Disregarding the entail of 1688

he made up titles to the estate, by retour, precept, and sasine, as *nearest and lawful heir male to his father*, in terms of and by the older investiture of 1632, which was conceived in favour of heirs male, which failing, to the nearest lawful heirs and assignees whatsoever. Afterwards, however, and in 1709, he was also served and retoured heir of provision under the tailzie of 1688; but he did not proceed to obtain any new investiture of the estate.

He died in 1712, leaving one son, James, who became the fourth Lord Bargany, and a daughter, Grizzel, who was married to Thomas Buchan of Cairnbulg. James, Lord Bargany, was served and retoured heir of tailzie and provision in general to his father; but no feudal investiture followed in his person.

By the mode of making up their titles to the estate, which had thus been adopted by the descendants of John, first Lord Bargany, the investiture, deriving from the destination of 1632, which had existed in his person, remained undefeased, although defeasible under the personal deed of tailzie executed in 1688 by his son, the *second* Lord Bargany.

In 1736, James Lord Bargany died without issue; and in him ended the line of male succession, both under the destination of 1632 and under the tailzie of 1688.

Under the destination of 1632, by which a tailzied fee had been created, the estate, according to the law and usage of Scotland, would have now devolved on the heir general, not of him last infeft in the estate, but of John, the first Lord Bargany. This was Hew Dalrymple, the eldest son and representative of Joanna Hamilton, by her marriage with Sir Robert Dalrymple of Castletown.

But the tailzie of 1688, as yet no more than a personal deed, was of force, and must be held to have regulated the succession, and, on the death of James, Lord Bargany, a question of law arose, to whom the succession had opened under the description in the tailzie of "eldest heir female," of the body of John, the second Lord Bargany.

It has been seen, that of his marriage with Joanna Hamilton, Sir Robert Dalrymple of Castletown had three sons, Hew, John, and Robert, and two daughters, Marion (married to the Master of Reay), and Elizabeth, (married to Sir Wm. Duff of Crombie.) Sir Robert died in 1734, before either the Bargany estate had devolved on his lady, or the North Berwick estate had devolved on himself,—his father,

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1801. Sir Hew Dalrymple, Lord President, having survived h
many years.

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In these circumstances, the competition which arose, w
between the following parties: 1. Hew Dalrymple, aft
wards Sir Hew Dalrymple of North Berwick. 2. Sir Al
ander Hope of Kerse, Bart., eldest son of Nicholson Ham
ton, the only daughter of John, the second Lord Barga
and, 3. Mary Buchan, daughter of Grizzel Hamilton, the o
daughter of William, Lord Bargany; and it has been se
Mar. 27, 1739. that this question was finally settled by an appeal to t
Ante vol. I., House of Lords, declaring that the estate descended to
p. 237. Hew Dalrymple, eldest son of the daughter, and only chi
of John, Master of Bargany.

In the meantime, the possession of the estate of Barga
had been assumed by him on apparency. It was also stat
that he made up no titles, nor proceeded to invest hims
in the estate of Bargany; and therefore that he might
held as one who *had not accepted of the succession*, a
consequently, was not placed under the compulsory ope
tion of the clauses irritant and resolute in the *entail*
North Berwick, which related to the succession of Barga

In this situation the deed of 1740 was executed, cal
the deed of repudiation, by which he denuded himself
the estate of Bargany in favour of his next younger broth
John Dalrymple, otherwise Hamilton, in terms of the pr
sions and conditions mentioned in the entail of the No
Berwick estate. This deed adopted the same terms of d
tination, and called the same heirs, as the deed of tai
1688. Under it John Dalrymple or Hamilton comple
his titles to the Bargany estate, by expeding charter in 17
upon which he was infeft. And in 1780 the deed, wh
was executed, and alleged to have been also a contravent
of the Bargany entail, followed.

The appellant, Marianne Mackay or Fullerton, is eld
daughter of George Lord Reay, eldest son of Donald, M
ter of Reay, who was married to Marion Dalrymple, eld
daughter of the marriage between Joanna Hamilton and
Robert Dalrymple of Castletown.

On failure, therefore, of male issue of Joanna Hamil
and their descendants, the appellant would be nearest l
of line of that lady, and in that rank she stood as a sub
tute under all the subsequent investitures, as well as un
the original tailzie of the estate of Bargany.

Her action was brought against John Hamilton or D

rymple, who died in the course of the action, also against Sir Hew, lately deceased, and his children, Hew (now Sir Hew Dalrymple), and his brothers and sisters, John, James, Robert, Peter, Margaret, Janet, and Anne Dalrymple. She was therefore the ninth substitute under the entail.

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It has been, on the other hand, seen that Sir Hew Dalrymple, the respondent's father, and the eldest son of Sir Robert Dalrymple and Joanna Hamilton, died without making up any title to the estate of Bargany, but that, in order to comply with the condition in the North Berwick entail, he had executed the deed of repudiation above mentioned, which was alleged to have inverted the order of succession prescribed in the Bargany entail, so as to make it diverge from the line of succession therein chalked out. And in the second summons of reduction which was raised, an additional ground of contravention was set forth, namely, the adjudication of the estate for debt due by John, Lord Bargany, by which a valuable part of the estate was sold, in payment of this debt, by Sir Hew Dalrymple and John Hamilton, but which had been purchased back by the latter.

The interlocutor of the Court of Session, which sustained her title to insist in the action, and had declared that the defender had not produced sufficient to exclude, being appealed to the House of Lords, that honourable House remitted the case back to the Court of Session to review the interlocutors appealed from, and to consider how far the validity of the title to exclude set up by the defender, was in this case involved with the title set up by the pursuer to sustain her action of reduction and declarator, as having become the nearest heir substitute under the deed of entail.

This second action of reduction and declarator had been raised, but never conjoined, and was allowed to be superseded in the meantime. At this stage, the pursuer presented a petition to the Court, to have this action conjoined.

The Court of Session, on resuming consideration of the remit, with this petition, ordered memorials. It was maintained by the appellant, that every substitute in an entail was entitled, in a question of prescription, to deduct her own minority, whether she was the first substitute entitled to take or not; but that, at all events, in consequence of the contravention, both of Sir Hew Dalrymple and his brother, Mr. John Hamilton of Bargany, by the deeds of 1740 and 1780 respectively, they had not only forfeited for themselves, but also for their children, and, consequent-

1801. ly, if they were all removed from the succession by this forfeiture, that she was not only the first substitute, but also the party on whom the estate had actually devolved as the *vera domina* thereof. On the other hand, the defender (respondent) contended that the appellant neither was nor could be the first substitute, because not only the respondent himself, but also his whole family, were heirs of entail prior to her. That his father, Sir Hew, had never been in a situation in which he could contravene, because, having only been apparent heir, and never having made up any titles to the entailed estate, he was not in a situation to do so; that, in point of fact, he did not contravene; and even if it could be shown he had done so, no declarator of irritancy was competent after his death.

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In reply, the appellant maintained five distinct propositions. 1. That the late Sir Hew Dalrymple, the first heir under the entail of Bargany, was in a legal capacity to contravene and to incur an irritancy under the entail. 2. That he did actually contravene, and incur an irritancy fatal to the rights of himself and his descendants. 3. That notwithstanding his death, an action of declarator of irritancy may still be maintained, to the effect of resolving the right of his descendants. 4. That the irritancy could not have been purged; and, 5. That the late Mr. Hamilton, the substitute next in the order of succession to Sir Hew Dalrymple and his descendants, was likewise in a legal capacity to incur an irritancy, and did actually contravene and incur an irritancy which could not have been purged.

Nov. 2 and
27, 1798.

The Court, of this date, pronounced the following interlocutor:—"Having resumed consideration of the former proceedings in the cause, and having considered the remit from the House of Lords, and heard counsel in their own presence, upon the said remit; and also advised the memorialists for the parties, they alter their former interlocutor, sustain the title produced by the defenders, as sufficient to exclude the pursuer's title; assoilzie the defender from the conclusions of the reduction, and decern."

In regard to the petition, praying to conjoin the two actions, the Court, of this date, refused to "conjoin the two processes *in hoc statu*. But find that it is still entire to the petitioners to insist in the separate action of reduction and declarator; and remit to Lord Armadale, in absence of Lord Justice Clerk, to hear the counsel for the parties, and to determine therein as to his Lordship shall seem just."

Dec. 11, 1798.

Lord Armadale pronounced, in terms of the remit to him, this interlocutor, "having heard parties upon the conclusions of this action, finds that the defenders have in this, and in the previous action to which the present has reference, produced and referred to preferable and exclusive titles to the lands claimed by the pursuer, and therefore assolizies the defender from the conclusions of this action, and decerns."*

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Mar. 9, 1799.

Against these interlocutors, two separate appeals were brought to the House of Lords; the one in the case remitted for reconsideration, and the other as to the second action of reduction sought to be conjoined.

Pleaded for the Appellants.—1st Point. That Sir Hew Dalrymple was bound by the entail 1688. Sir Hew Dalrymple was bound by the entail of Bargany, and subject to all the conditions and limitations therein contained. In

* The opinions of the judges, in pronouncing the first of these three interlocutors, are to be found, printed at length, in Wilson and Shaw's Appeal Cases, Vol. I, Appendix III. An analysis of these opinions will give the following result. 1. The Court were unanimous in finding that no contravention had been committed, and, consequently, that Mrs. Fullerton was neither the *vera domina*, which was the position assumed by her, nor the nearest heir substitute of entail; her argument being, that if she could show she was the *vera domina*, or the next heir entitled to the possession of the estate, she was no longer in the rank of a mere heir substitute of entail, but advanced in the order of succession to the situation of one who was legally entitled to plead her minority. 2. A majority of the Court found, that if the acts of contravention alleged by her, had amounted to a contravention of the Bargany entail, these were purgeable, and had in this case been purged. 3. That an heir apparent, in possession of the entailed estate for several years, without making up titles under the entail, was not legally capable of committing an act of contravention of the entail. 4. That an action of declarator of irritancy was necessary, but not competent after the alleged contravener's death; and, 5. As to the plea of minority, as an exception to the positive prescription, six of their Lordships held, that the minority of an heir substitute of entail, whether the nearest or most remote, could not be deducted from the period of the positive prescription. The other judges were some for deducting the minority of the first heir substitute, and others for deducting the minority of the whole heirs substitute; but the decision of this last point, it was said, was unnecessary, and was superseded by the decision on the first point.

1801. 1736, after the succession opened to him by the death of James, Lord Bargany, he immediately entered into possession of the estate of Bargany as heir of entail, and in that character enjoyed the same for upwards of four years and a half, until the 13th of August 1740, when he executed the deed of repudiation in favour of his brother John Dalrymple. Upon the succession opening to him, Sir Hew not only assumed the name of Hamilton of Bargany, in terms of the entail, but, in the deeds which he executed, designed himself apparent heir of tailzie to the estate of Bargany; and one of his first acts of his administration was, to grant an assignation of the rents of that estate to Mr. James Craig, for the purpose of paying certain debts, and paying himself £250 sterling yearly. This assignation expressly states, that his grandfather Sir Hew, the President, has authorized "and allowed me to be served and retoured heir of the "tailzied estate of Bargany, according to the provisions and "conditions contained in the tailzie of the estate of Bargany;" and thereafter it narrates the clause in the Lord President's deed of settlement, requiring him and his heirs to denude themselves of the estate of Bargany in favour of his brothers John and Robert, "which failing, to the other "heirs appointed to succeed to the estate of Bargany by "the tailzie thereof." In short, every word of this assignation proceeds upon the fact of his being heir of tailzie to the estate of Bargany. The factory which he granted to John Kennedy for uplifting the rents is still more explicit; for in that he expressly designs himself "apparent heir of tailzie "to the deceased James Lord Bargany and his predecessors; and it mentions "the estate of Bargany which belonged to the deceased James Lord Bargany and his predecessors, and which has now devolved to me, as heir of "tailzie."

Indeed, the competition which arose after the death of Lord James, was to determine the question which of the competitors was entitled to be admitted heir of tailzie to the said James Lord Bargany. And in the very deed of repudiation Sir Hew specially recites the judgment of the House of Lords, adjudging the estate to him in that character, and that he ought to be served heir of tailzie and provision to the said James Lord Bargany." Thus, even if it had been possible to impute Sir Hew's possession of this estate to any other title than as that of apparent heir of entail, he took care, by every act of possession and administration, to

demonstrate that he possessed it alone in that character. But it is impossible to impute Sir Hew's possession to *any other title* than that of apparent heir of tailzie, because he had no other character or title whatever in his person. For if Sir Hew had not possessed the estate upon the entail, then he had not the smallest pretence for possessing it, especially in a competition with Sir Alexander Hope and Miss Mary Buchan, claiming as heirs of entail, because he was neither the heir of line nor the heir of the standing investiture. Miss Mary Buchan was unquestionably the sister and heir of line of James Lord Bargany, the last possessor; but what is more, she was the heir of the last investiture, being also heir of line to William Lord Bargany, who was the person last infeft. For William Lord Bargany had made up titles to the estate of Bargany independent of the entail, as nearest heir male of John Lord Bargany his father, in terms of the ancient investitures of the estate; and upon a retour in these terms, he obtained a precept in chancery, upon which he was infeft in Dec. 1693, and his sasine duly recorded in the same year. He obtained a precept of clare constat of another part of the estate held of the Earl of Cassilis, upon which he was infeft, and his sasine in like manner recorded. These sasines incontestably proved that if the entail 1688 had not regulated the succession upon the failure of heirs male by the death of James Lord Bargany in 1736, Miss Mary Buchan was both heir of line and of the last investiture. Sir Hew had no claim whatever to the estate but as heir under the entail 1688. And the House of Lords preferred him as such, and every act of his, both before and after the judgment, demonstrates his desire to impute his possession to that entail alone. Having, therefore, taken the benefit of the entail, and possessed as heir of entail, and uplifted the rents of the estate—to the amount of many thousands—in the character of heir of entail alone, it is impossible to hold that the entail was not binding on him, or that he was not subject to all its provisions, limitations, and irritancies. But, further, his *apparency* did not prevent contravention. It is perfectly absurd to suppose, that a person, as apparent heir of entail, is entitled to reap the whole emoluments of the estate, and to take advantage of the tailzie in every respect, without submitting to all the conditions and irritancies which it contains. There are certain things which, as apparent heir, he cannot do, such as removing tenants. This, however, arises from the

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Apparency
does not pre-
vent contra-
vention.

1801. peculiarity of the feudal system, and is not confined to ap-
 FULLERTON, parent heirs of tailzie, but is common to an apparent heir,
 &c. or to a disponee in a fee simple, under a deed remaining
 v. personal. An apparent heir of tailzie, like other proprietors
 HAMILTON. possessing under a personal right, is still proprietor of the
 estate, and the only person who can reap the rents and pro-
 fits of it; and any other particular powers and faculties
 which depend upon infestment, he may also secure to him-
 self by taking infestment. But a person possessing an estate
 as apparent heir of tailzie, must be bound in terms thereof,
 just in the same way as if he had been infest, because he
 cannot be suffered to enjoy an estate which he holds under
 a particular settlement, except according to the conditions
 of that settlement; and, therefore, after enjoying the rents
 and profits of the estate conferred by that entail, every con-
 dition and irritancy which it contains must be directly ap-
 plicable to him. As apparent heir, therefore, he was in a
 situation legally to contravene the entail in its most essen-
 tial parts, and to commit irritancies which, from their na-
 ture, could not be purgeable. But, further, he might also
 have affected the estate with burdens. The entail allows
 very liberal provisions to be settled by heirs of entail upon
 their wives; and it seems clear, that although Sir Hew
 never made up titles to the estate, that he might have bur-
 dened it with the jointure allowed by the entail to his wi-
 dow; for if he had either entered into a contract of mar-
 riage, by which he had become bound to grant his widow the
 jointure authorized by the entail of Bargany, or granted a
 bond of provision for that purpose, these would have been
 effectual against the estate, and would have affected the
 next heirs of entail, even though he had died in apparen-
 cy. By the act 1695, c. 24, it is enacted, "that considering the
 frequent frauds and disappointments that creditors do
 suffer from the decease of their debtors, and through the
 contrivance of apparent heirs in their prejudice, for re-
 meid thereof, and also for facilitating the transmission of
 heritage in favour of both heirs and creditors," it is or-
 dained that if any one shall serve himself heir, not to his
 immediate predecessor, but to one more remote, "he shall
 be liable for the *debts* and *deeds* of the person interjected
 to whom he was apparent heir, and who was in possession
 of the lands and estate to which he is served, for the space
 of three years." Although it has been found, in the case
 Kaimes, p. 44. of Lord Dundonald, that this statute did not apply to the

case of gratuitous deeds, such as an entail, or alteration of the destination of the estate, made by an apparent heir, yet, nevertheless, it has been held to apply to the case of an heir apparent making a provision for his wife, in terms of the contract of marriage, or even to an apparent heir settling a voluntary provision upon his grand child. The last of these cases was finally decided in the House of Lords upon appeal, *M'Lean v. M'Lean*, 8th Feb. 1765. There can be no doubt then, that if Sir Hew had died in a state of apparentcy, his widow might have been entitled to claim the provisions settled upon her by the contract of marriage; or by any bond of provision granted by him, if within the limits of the entail. There can be no distinction whether the estate is *entailed* or *not* in the application of the statute 1695. For, at all events, where the heir was allowed to burden the estate, or to contract debts, the estate, to that extent, was not entailed. It would be most extraordinary, therefore, if Sir Hew, by his enjoying this estate for no less than five years, and being in a situation so far to affect the estate with those debts, was not in a situation to contravene the entail.

But, further, the estate of an apparent heir may be adjudged by creditors, and this very estate of Bargany was not only adjudged during the time it was possessed by an apparent heir of entail, for payment of his debts; but the fact is, that a great part of the estate has been sold in virtue of that adjudication. For Joanna Hamilton, afterwards married to Sir Robert Dalrymple of Castletown, the respondent's grandmother, having brought an action against William Lord Bargany, then apparent heir of entail, to make payment to her of a suitable aliment of 900 merks Scots yearly, from her birth, until she was twelve years of age; and 1200 merks from that time until she was sixteen years of age, when her portion became due; and having obtained decret for these sums, she afterwards adjudged the estate for payment of them. And the estate was afterwards adjudged for payment of 30,000 merks, as the portion provided to Joanna Hamilton in the contract of marriage contained in the entail of Bargany. But, at this period, William Lord Bargany was only *apparent heir of entail*, and had not even served himself heir of tailzie. Indeed he died without ever having made up his titles upon the entail, although part of the estate was afterwards sold in virtue of the adjudications led against him by Joanna Hamilton. It surely could

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Kaimes, p. 44.Vide ante vol.
II. p. 95.

1801. **FULLERTON, &c. v. HAMILTON.** hardly be maintained that William Lord Bargany could not have contravened the entail, when the estate was thus adjudged, on account of his not having paid a proper aliment to Joanna Hamilton, his brother's daughter, which he certainly ought to have done out of the rents of the estate. An apparent heir, therefore, may not only burden the estate, but it may actually be adjudged for payment of his debts; and this very estate of Bargany was adjudged on account of the debt of an apparent heir. In short, such absurdities as necessarily result from the plea, that an heir apparent of entail cannot incur an irritancy, cannot be founded in law; and, accordingly, the Court of Session have frequently decided that apparent heirs of entail can incur irritancies, just as much as they had been infest. This was in effect decided

Kaimes, Feb. 21, 1726; Mor. 7275. in the case of *Denham*. In that case, the declarator was founded upon an irritancy committed by an apparent heir of entail. And the irritancy was said to consist "in Sir Robert Denham having retoured himself heir of provision to Sir William Denham, maker of the tailzie, without repeating in the retour the provisions and irritant clauses in the tailzie, and by bruiking and enjoying the tailzied estate by virtue of the retour." It was not even argued, that as he was only apparent heir, and had not made up titles, he could not incur an irritancy. And the Court found that this was an irritancy of the entail. But, on appeal to the House of Lords, (17th February 1736, *Craigie and Stewart's Appeal Cases*, ante vol. i. p. 113), that House was of opinion, that in point of fact, the omission of the irritant clauses in the retour was not an irritancy. Not only so, but the Court of Session have found that the same limitations and irritancies are binding against creditors. This was found in the case

Kaimes, Nov 21, 1753. Mor. 10258. of *Gordon of Carleton*. But afterwards, in another question upon the entail of Carleton, this point was again decided in the most solemn manner. William Gordon, the last successful competitor, having died, the succession opened to Sir Thomas Gordon of Carleton, his elder brother. He was opposed by a new party, Mr. Murray of Broughton, who was not only a creditor, but a purchaser from one of the former *apparent heirs*. The summons sought to declare an irritancy against Alexander Gordon, the heir of Nathaniel and Alexander Gordons, who possessed this estate only as apparent heirs of entail. But although the papers were in this case drawn most fully and ably by the late Lord Justice Clerk (M^cQueen) upon the part of the creditors and pur

chaser, yet the Court sustained the objections to Mr. Murray's title, and preferred Sir Thomas Gordon, thereby establishing, in the most solemn manner, that an apparent heir may incur an irritancy in the same manner as if he had entered and made up a feudal title. This was even in a question with creditors, who are generally more favoured than when the question occurs with heirs. Having thus shown that Sir Hew was bound by the entail, and was in capacity to incur an irritancy, the next point is, to show that he did actually contravene.

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v.
HAMILTON.
June 14, 1766.

2d Point.—Contravention of the entail by Sir Hew. Contravention. From the absolute and unlimited power of disposal which a person is allowed to exercise over his own property by the law of Scotland, he has not only the right of using and enjoying it as he pleases, but of settling its destination after his death, in any manner, and under whatever conditions he shall think proper. A person may therefore either settle his estate upon his natural heir, under such conditions and burdens as he shall think proper to prescribe, or he may call any series of heirs, or strangers, as he shall think fit, to his succession. Upon these principles, entails with conditions, have been known from the earliest period of the law of Scotland. And there can be no doubt that these conditions were strictly effectual against the heirs called to the succession by the entail. And it has been found in the case of Stormont, decided so early as 1662, that these clauses were effectual against purchasers and creditors. And the statute 1685, regarding entails, put this beyond all question. First, then, in regard to the contraventions of the conditions in the Bargany entail, Sir Hew Dalrymple contravened the entail in three distinct ways. 1. He contravened by the deed of repudiation which he executed in 1740, in favour of his brother, John Dalrymple, by which, after having been in possession of the estate of Bargany for upwards of four years as heir of entail, he directly, in the face of the tailzie, gave up this estate to his brother John. No matter by what cause, and under what necessity, this took place. It is indisputable that he not only allowed another to succeed, who might not have succeeded, but actually conveyed the estate to him. Sir Hew Dalrymple, by his son's contract of marriage with Joanna Hamilton, settled the estate of North Berwick on his son, Sir Robert Dalrymple of Castletown, expressly providing that the estate of North Berwick and Bargany should never be united, except in the event of there only

Stair's Decisions. Feb. 26, 1662. Mor. 13994.

1801. being one son of the marriage; and it was therefore expressly declared in that settlement, that if the heir of the estate of North Berwick should take up the estate of Bargany, he should lose his right to North Berwick estate.
- FULLERON, &c. v. HAMILTON. There was a power, however, reserved by the President, to discharge altogether, or to modify this condition, and to revise it again in any manner of way he thought fit. Accordingly, when, in 1736, the late Sir Hew, who, by the death of his father, was at that time in the fee of the estate of North Berwick, succeeded, as heir of entail, to the estate of Bargany by the death of James Lord Bargany, as he could not take up that estate by the condition of the entail without losing the estate of North Berwick, the President then exercised the power thus reserved by him, in modifying that condition, "so far (to allow him) to accept of the succession to the estate of Bargany, as to be served and returned heir of tailzie to that estate, and thereby to be in a condition to denude himself thereof in favours of the next person after him, called to the succession by the tailzie of the said estate of Bargany, which is the most regular and effectual manner of conveying the said estate in favours of the next person in the line of succession to the tailzie of the said estate of Bargany."
- April 8, 1736.

For this purpose, he allowed him to assume the name and arms of Hamilton of Bargany, and to enjoy the rents of the estate of Bargany as long as he should be allowed to enjoy both estates, but no longer. And, the very next day, the President executes the other deed, by which he ordains the said Sir Hew Dalrymple, "to divest and denude himself *omni habili modo* of his right and title to the estate of Bargany in favour of John Dalrymple, his second brother, and the heirs of his body; which failing, to Robert Dalrymple now his third brother, and the heirs of his body; which failing, to the other heirs appointed to succeed to the estate of Bargany by the tailzie thereof." Then follows the deed of repudiation in 1740, executed by Sir Hew in favour of his brother John Dalrymple, and the heirs of his body, &c. In considering, therefore, the question, Whether Sir Hew contravened the entail of Bargany by altering the order of succession? the reason which induced him so to do cannot enter into the question. The proper question is Whether the entail of Bargany was contravened or not? and this question must be determined independent of the entail relating to another estate. That this deed of repudiation

April 9, 1736.

was an act of contravention, by which the order of succession in the entail of Bargany was frustrated and interrupted, and was altered, innovated, and changed, the appellant apprehends there can be no doubt. By the entail of Bargany, Sir Hew, and the whole heirs of his body, are called before John, and the heirs of his body, so that there is an inversion of the order of succession, to the effect of passing over Sir Hew, and the whole heirs of his body, and giving the estate to John Dalrymple. This is both "*frustrating and interrupting*" the order of succession. It is introducing one substitute, and his heirs, before another prior to him in the entail, which is as much an alteration of the order of succession as if a stranger was so preferred. The entail act of Parliament 1685, c. 22, uses the words "*frustrate and interrupt.*" And the words used in the North Berwick deed are, "any way innovated, altered, or changed. But the meaning of these latter words is certainly precisely the same with the terms frustrate and interrupt used in the statute; and they could only be introduced for the purpose of preventing the heir of entail in possession from bringing B before A, or D before C. It is no matter therefore what the deed is, or what it is called; whether it is a regular conveyance, a repudiation, or any other deed that can be conceived; provided it has the effect directly or indirectly to alter the order of succession. And if the deed of 1740, which has been called a deed of repudiation, has this effect, there can be no doubt Sir Hew Dalrymple has contravened the entail. It is equally clear, that it was by this deed alone that John Dalrymple was enabled to serve himself heir of entail to the estate of Bargany, and no jury could have found that he was next heir of entail but for that deed. Accordingly, the service proceeds upon the judgment of the House of Lords finding Sir Hew entitled to succeed. But it is quite evident that John Dalrymple could not be the next heir of tailzie to James Lord Bargany, so long as his elder brother Sir Hew, and the heirs of his body, were alive. But by this service he completed a feudal title to the estate; and an irritancy of the entail was thereby incurred. 2. An irritancy or contravention was further incurred, by his relinquishing the name and arms of Hamilton, after having assumed these for four years. But, 3. It has been seen by the appellant's second summons, which the Court of Session has refused to conjoin with the first summons, that a contravention has been incurred, by allowing adjudication to be

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1801. led on the estate, and a valuable part of it to be sold for the payment of debt. The maker of the entail of Bargany on FULLERTON, &c. allowed contractions to a limited extent, for provisions v. widows and daughters, and declared, that if any "adjudication or other diligence led for these against the land and estate, or any part thereof, for the said sum of 40,000 pounds Scots, then, and in that case, the heirs of tailzie shall be bound and obliged to purge the said diligences three years before the expiry of the legal at the least, within six months after their succession;" and the person "contravening, and the descendants of his body, shall *ipso facto*, amitt, lose, and tyne their right of the said lands, and the same shall pertain and belong immediately to the person who would have succeeded as next heir of tailzie." He has therefore contravened on this ground alone.

Irritancies not purgeable. 3d Point.—Irritancies not purgeable. The respondent has maintained, in regard to these contraventions, that even supposing Sir Hew had committed an irritancy, he was entitled to purge that irritancy. But, in considering this point, it is necessary to draw a distinction between irritancies in general, and to confine the argument to irritancies of entail in particular. The latter are perfectly different from the irritancies in onerous deeds. Irritancies from omission may be purged. But, in an irritancy of the other kind, that of commission, where the heir actually does something which the entail forbids, at any time, or in any shape, the condition is violated the moment the forbidden act is done. The forbidden act, once done, cannot, in the law of Scotland be undone, even although the consequences of it may be so far prevented. A person who is forbid to marry a particular lady, and, notwithstanding, marries that lady, does no surely the less contravene the condition of that entail, though his wife dies in a short time, and leaves no issue. He has no right to the estate but in virtue of the entail, the express condition of which was, that he should not marry that lady. The condition here is absolutely the same, the condition being, that he should not alter the order of succession, even for a period however short, without incurring an irritancy. And therefore the deed which conveyed the estate back from John Hamilton to Sir Hew Dalrymple, cannot save from that consequence.

Lord Bankton, without marking by name the distinction between irritancies of *commission* and *omission*, clearly

points out the difference in their nature, and lays down the rule of law upon the subject thus: "The Lords of Session, "in declarators of irritancy for contracting debts, allow "some time to the contravener to purge the irritancy, by "payment of the debts. But where the irritancy is incur- "red by the heir's not engrossing the clauses in his right "to the estate, they will not allow it to be purged. This "last is a complete deed of contravention, which subjects "the estate to the payment of the heir's debts, *et factum infectum fieri nequit*. The titles made up in contraven- "tion of the entail cannot *be undone*, but the other only "becomes such a contravention by the estate being adjudg- "ed." Neither are these irritancies properly penal; they are merely conditions and provisions qualifying the gratuitous grant, and without which it cannot be enjoyed by the heir called to the succession. This doctrine is laid down by all the authorities. Lord Stair states: "These clauses ir- "ritant in tailzies, are not properly penal, because it was p. 3. "in the power of the constituent to assume or not to as- "sume these heirs of tailzie to be his heirs." Mr. Erskine on the subject also says:—"Hence irritancies are most "strictly observed against the grantee of gratuitous deeds; "for as that sort proceeds from the liberality of the grant- "or, who had full power over the subject to dispose of it "as he pleased, the grantee, who paid no valuable consid- "eration for the grant, truly suffers nothing though it be "irritated or annulled." And the whole train of decisions is in exact conformity with these principles laid down by Lord Stair, Lord Bankton, and Mr. Erskine. Indeed, were irritancies of commission purgeable, there might soon be an end to every entail, as every heir of entail would make up his title directly contrary to the positive instructions of the entail, or commit any other irritancy he thought fit, with the hope of freeing himself altogether from the fetters, if the fact escaped detection for the period of forty years. While, if he was discovered, he ran no risk if he was allowed to purge the irritancy at any time. It is scarcely necessary, however, in this case, to contend that Sir Hew was not entitled to purge the irritancy arising from the deed of repudiation. The irritancy committed by that deed was not capable of being purged. He could not purge it, from the situation in which he was placed with reference to the North Berwick estate, without the consent of another. And no one, in such a situation, is entitled to plead that the irritan-

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cy he has committed is purgeable. But, even if Sir Hew could have prevailed on his brother John to resign the estate of Bargany, of at least £5000 a-year, even both of them could not have purged this irritancy. The descendant of *John*, or the heirs of entail called by the tailzie 1688 after the descendants of *John*, had a *jus quæsitum*, fortified even by prescription, in a question with Sir Hew Dalrymple and his descendants, that could not be defeated, and therefore the irritancy could not be purged by the joint consent both of Sir Hew and his brother. Besides, they could not do away the fact, nor remove the feudal title which had been completed in the person of John Dalrymple, upon which he had enjoyed the estate, contrary to the express will of the entailer, for a period of nearly fifty years. They could not do away with the title which John had made up—his service as heir of entail to James Lord Bargany;—his decret of declarator against his brother,—and his charter and infeftment in 1742. In short, whatever attempt they might have made at *reparation*, they could never do away with the contravention which had actually taken place. The deed, therefore, of 1780 cannot remedy matters. It made matters worse instead of better.

Declarator of irritancy is not necessary, and is competent after the death of the contravener.

4th Point.—But it is said that an irritancy cannot be established, except by an action of declarator before the Court of Session, and that it is impossible now to obtain decree in such an action, after the death of Sir Hew Dalrymple even if he had actually contravened. The foundation of this plea is the maxim in the Roman law, *quod actio penalī non transit contra hæredes*. But this maxim, however just it is, if confined to actions properly penal, that is, founded upon crimes or delicts, cannot apply to the conditions contained in gratuitous settlements, although these conditions carry some hardship along with them. Accordingly, it never was supposed that actions for the recovery of the property depending upon conditions in testaments, such as *sine liberis decesserit, si navis non pervenerit, si hæres uxorem ducat, si servum Getam manumittat*, were in the Roman law *penal actions*, which did not pass against heirs. The present action of declarator is precisely of the same nature, and it is absurd to call it a penal action. Sir Hew is not charged with having committed any crime or delict when he contravened this entail, nor did he truly commit any. It will no doubt be a hardship to either the one party or the other to lose this estate, but there is surely a grea

difference between this result, and an action purely penal in its nature. The action brought by the appellant is no doubt called a declarator of irritancy, but is in reality an action *rei persecutoria*, the object of which is, to obtain possession. And this idea is agreeable to all the writers on the law. Lord Stair, b. iv. tit. 18. § 3 and 6, and Mr. Erskine, b. ii. tit. 5, § 25, declare that irritant clauses in entails are not penal, and, consequently, actions declaring them, must transmit against heirs of entail in the same way with any other action whatever. Vide case of Cassil of Kirkhouse (not collected) decided in 1719; Scott of Galla, 18th June 1722, (Mor. 3673); Stewart v. Denham of Westhall, 1st Feb. 1726, (Mor. 7275); House of Lords, 17th Feb. 1736, Craigie & Stewart's App. Cases, vol. i. p. 113; Gordon of Carleton, Kilkerran, 14th Nov. 1749, (Mor. 15384); Little Gilmour v. Hunter, 27th Feb. 1800, Mor. App. Tailzie, No. 9.

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5th Point.—But even no action of declarator is necessary to declare such an irritancy against Sir Hew Dalrymple, because the appellant conceives that his voluntary deed of repudiation superseded the necessity of all such. If Sir Hew has voluntarily resigned the estate, any action of declarator of irritancy against him is perfectly unnecessary, as, by means of this repudiation, and the decree of declarator thereon, the estate was completely vested in John, his brother. John being thus vested with the estate, as heir of entail, the estate must have descended after him to the heirs called by the entail 1688, upon his failure. Upon his natural failure it must have been taken up by the descendants of his body, if he had any, and, upon their failure, by his brother Robert, the next heir of entail, and the heirs of his body; and, upon their failure, by the appellant, as the descendant of Marion Dalrymple, his eldest sister. As, therefore, John Hamilton had no children, and his brother Robert predeceased him without issue, the appellant was, in point of fact and law, the next heir of entail entitled to this estate; and therefore the party entitled to raise an action after John Hamilton's death. And it was only by a further act of contravention on the part of Mr. Hamilton in executing the deed of 1780, that she was obliged to raise an action of declarator at all, whereby the disponees in that deed were brought into the field.

6th Point.—Having thus shown, by the contraventions of Sir Hew Dalrymple, and his brother Mr. Hamilton, that she

No declarator
 necessary.

Prescription
 and minority.

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But even supposing prescription did apply to her, yet, in so far as the respondent founds upon the charter and assize 1742, as a complete prescriptive right, she maintains that no

prescription has taken place, on account of her minority. And further, even though the charter and sasine had been fortified by prescription, she is still, according to the conclusions of her declarator, entitled to maintain that she alone has the proper right under that charter. For as it is taken "to John Dalrymple *alias* Hamilton himself, and the heirs "whatsoever of his body, whom failing, to the other heirs "whatsoever of the body of the said Mrs. Joanna Hamilton "procreate betwixt her and the said Sir Robert Dalrymple, "without division," in a matter of construction as to the party meant by these terms, they must be construed with reference to the warrant of the charter, and conformably to the tailzie 1688. These terms, therefore, must be taken to mean the appellant, as being now the next heir of entail after the death of Mr. Hamilton.

Pleaded for the Respondent.—(1.) The facts alleged by the appellants do not amount to a contravention of the entail of Bargany, and cannot be made the ground of resolving the respondent's right under that entail. The deed of repudiation was neither a disposition, conveyance, nor alteration of the order of succession. The effect of that deed was only to permit his brother, John Hamilton, to intromit with the rents of the estate, until such times as he could conveniently take it up; and as an heir of entail may dispose of the rents of his estate in any way he pleases, and as there was a reservation to resume possession of the estate again, and as in point of fact he did resume it by the deed 1780, this repudiation could in no view be held as a contravention of the entail, or the order of succession therein. Besides, it was *jus tertii* in the appellant to object to this alteration, because her place in the succession, under the entail, was in no degree affected by that deed of repudiation; nor her interests in any way injured. She still retains her place in the order of succession marked out in the entail. And as to those lands sold under the adjudications, it was clear, by the entail itself, that the heirs of entail were allowed "to wadset or "to sell and dispoise heritably, as much of the lands and "others foresaid, as will pay a sum of 40,000," for debts or for provisions to daughters; and this debt, under which part of the estate was sold, was a provision to Joanna Hamilton. Looking, therefore, to his charter and sasine of the estate of Bargany in 1742, followed by possession for forty years, it is quite indisputable that he has acquired a prescriptive title under the statute 1617, sufficient to ex-

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1801. **FULLERTON, &c. v. HAMILTON.** clude the present action; and no minority could interrupt this prescription, 1st. Because the minority of a substitute heir of entail cannot be deducted from prescription; and also, 2. Because minority is not pleadable against the positive prescription, but only against the negative; but, (2.) Even supposing the exception in the statute was held to relate to the positive as well as the negative prescription, it can only be pleaded by the true proprietor of the estate, not by a substitute heir of entail; and the appellant's interest is only as heir substitute of entail. (3.) Among heirs substitute in an entail, whether immediate or remote, the law has recognized no distinction of legal character and legal right. Until the succession, or the right to present, and actual enjoyment, has devolved on the substitute, either by the failure of prior heirs, or by a judicial sentence, resolving their right under the entail, the substitute does not become vested in that character of ownership which would bring him within the benefit of the statutory exceptions, and therefore the allegation of the appellant, that contraventions against the entail were committed by prior heirs and substitutes, upon which an action of declarator of irritancy *might* have been founded, is irrelevant in law to sustain the plea of minority against the force of the positive prescription. (4.) The allegation of the appellant is not only irrelevant in law, but is unfounded in fact. She never was possessed of a right of action against the prior substitutes under the entail of Bargany, which could have brought her into the property of the estate; 1. because the prior substitutes were not legally capable of incurring an irritancy which could have injured their right under the entail; 2. because, although they had been legally capable, the facts alleged would not have amounted to a contravention; 3. Although they had, yet the facts alleged having been done away, and purged by the deed 1780, before any declarator of irritancy and decreet was obtained, no contravention is now pleadable; and, further, after the death of the alleged contravener, action could not lie against his descendants for resolving their right under the entail. (5.) The attempt to conjoin the second action of declarator with the original action, after the latter had been fully discussed in the Court of Session, after an appeal to the House of Lords, and when the Court was acting on a remit from that House, was most justly rejected.

After hearing counsel,

LORD CHANCELLOR ELDON said,*—

“ My Lords,

“ This cause, which has occupied so much of your Lordships’ time, and has had, very deservedly, so much of your attention, arises from an appeal brought by the Honourable Mrs. Hamilton Fullerton of Bargany, wife of Colonel William Fullerton of Fullerton, and the said Colonel William Fullerton for his interest, against two interlocutors of the Court of Session, the one dated the 27th November 1798, the other the 9th March 1799. The first of these, the 27th November 1798, states : ‘ That the Lords of Session, having resumed consideration of the former proceedings in this cause, (which I am afraid I shall be obliged to state in some detail to your Lordships,) ‘ and having considered the remit from the House of Lords, (the terms of which it will be my duty to state very distinctly to your Lordships,) ‘ and heard counsel in their own presence, upon the said ‘ remit, and also advised the memorial for the parties, they alter ‘ their former interlocutor, sustain the title produced by the defender as sufficient to exclude the pursuer’s title, assoilzie the defender from the conclusion of the reduction, and decern.’

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“ So that your Lordships see, that the grounds upon which they assoilzie the defender from the conclusion of the reduction, and decern, is this, that they sustain the title produced by the defender, as sufficient to exclude the pursuer’s title, not stating whether they conceive the pursuer had a title to pursue or not, but using terms which certainly, in their ordinary exposition, do imply that the pursuer had some title.

“ My Lords, a petition had been presented for a diligence for recovery of certain writings therein mentioned, particularly two deeds executed in the year 1736, by Lord President Dalrymple, and further praying the Court to conjoin the two processes.

“ Upon the 11th December 1798 the Lords, having resumed consideration of this petition, and advised the same, and particularly having considered their deliverance therein, dated the 10th July last, which was granting the diligence prayed for, but superseding the determination upon the other prayer of the petition until the 1st day in November, ‘ and having considered their interlocutor,’ which I have just had the honour of stating in the other process of reduction, signed upon the 27th of November last, they refuse to conjoin the two processes in that state ; but find that it is still entire to the petitioners to insist in the separate action of reduction and declarator, and remit to Lord Armadale, in the absence of the Lord Justice Clerk, to hear the counsel for the parties, and to proceed and determine therein as to his Lordship shall seem just.

“ This cause was then heard before Lord Armadale, and his Lordship was pleased to pronounce the following interlocutor on the

* Mr. Gurney’s short hand notes.

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9th March 1799 :—‘ The Lord Ordinary having heard parties upon
 ‘ the conclusions of this action, finds that the defenders have, in this
 ‘ and in the previous action, to which the present has reference, pro-
 ‘ duced and referred to preferable and exclusive titles, to the lands
 ‘ claimed by the pursuer, and therefore assoilzies the defender from
 ‘ the conclusions of this action, and decerns, superseding extract
 ‘ until the third sederunt day in May next.’

“ This interlocutor, your Lordships will observe, in the terms of it, asserts that the defenders had produced and referred to preferable and exclusive titles to the lands claimed by the pursuer. The language of which, according to the ordinary acceptation of the terms in which it is conceived, certainly means to assert, that there was some title to be excluded in the pursuer. Whether that observation shall be said to be justly founded, attending to the technical proceedings in the law of Scotland, will be matter of observation, which I shall have to submit to your Lordships hereafter.

“ Meantime, it is for me now to state to your Lordships, that these interlocutors have been founded (pronounced ?) in consequence of a remit made by your Lordships to the Court of Session, and, with a view to render myself intelligible, in what I humbly submit to your Lordships’ attention, I will, with your Lordships’ leave, as shortly as I can, state the circumstances of this case. It appears, that in the year 1688, John Lord Bargany executed a settlement of his estate of Bargany, in the county of Ayr, in the form of a strict entail, in favour of his son, John, Master of Bargany, and the other heirs therein mentioned, under the usual limitations, and guarded with clauses prohibitive, irritant, and resolute, in common form. This entail is contained in the marriage contract which was executed betwixt John Master of Bargany, eldest son of the said John Lord Bargany, and Jean Sinclair, daughter of Sir Robert Sinclair of Longformacus, baronet, to which contract Lord Bargany was a party.

“ It is not necessary, in order to render intelligible what I have the honour to submit to your Lordships, to detail the several limitations in this instrument of 1688 ; it is enough, perhaps, at present to say, that if the prior takers, by whom, I mean Sir Hew, and John Dalrymple, called throughout this cause John Hamilton, had been guilty of contravention against this entail ; and if those contraventions, under the view of the Court of Session, were to be held as bringing the event of forfeiture of each of them, there could be no doubt Mrs. Fullerton’s title would come forward, so as to enable her to take possession and enjoyment of the whole estate.

“ The prohibitory, irritant, and resolute clauses of this entail, have been frequently stated to your Lordships, and it is enough to state so much of them as prohibit John Master of Bargany, or the heirs male of his body, or any other, the members of tailzie above mentioned, to alter, innovate, or change the foresaid tailzie, and order of succession above mentioned, or to do any other deed, direct-

ly or indirectly, in any sort, whereby the same may be in any wise altered, innovated, or changed : And the persons so contravening are to forfeit *ipso facto*, for themselves and their heirs. To be sure, the words are very strong, attending to the ordinary import of them, and they are words which, perhaps, at first view, one should feel it difficult to say, might not be taken to prohibit any innovation in the enjoyment of an estate which is other than the subsisting destination. Innovation, or change, can hardly be said to operate any prejudice in fact against the person who would thereby take under the limitation, whoever might be the party who would first take.

" It is fit to mention here, that this deed of entail, though drawn with great care and accuracy, as far as I am able to judge upon the subject, certainly has not made it incumbent upon the person who was to take under the limitation, to lye out, as they call it, unentered. That is to say, he might take possession ; he might intromit with the rents, and yet would not have the estate vested in him. This is a remarkable circumstance, because a great deal of argument in this case proceeded upon that subject. I need not trouble your Lordships with stating at what period the several persons entered into possession of the estate and died, who had the enjoyment and possession of the estate previous to Sir Hew Dalrymple, of whose acts your Lordships have heard so much in this cause.

" It appears that, in 1736, those who were entitled to a prior possession of the estate expired. James Lord Bargany died in 1736, without leaving children ; and, by his death, the issue male of John Lord Bargany, the maker of the entail, became extinct ; so that the right of succession to the estate of Bargany devolved, in terms of the entail, upon the branch of substitution immediately next to the heirs male of the granter's body, which was the eldest heir female of the body of the said John Lord Bargany, and the descendants of her body without division. The person entitled to succeed under the above description was Hew Dalrymple, (afterwards Sir Hew Dalrymple of North Berwick), the eldest son of Joanna Hamilton, who was the only daughter of John Master of Bargany, the eldest son of John Lord Bargany, the maker of the entail ; and that gentleman, as has been very truly represented, as heir of entail to the estate of Bargany in April 1736, assumed the name of Hamilton, as directed by that entail. He likewise is stated, and that statement is founded in consequence of his having executed a factory to John Kennedy, and to other persons whom he is stated to have constituted, for the purpose of receiving, or at least put them in the faculty and power of receiving the rents of the estate, to have described himself in certain instruments, other than those which have been stated as forming the contravention, as well as those which are stated as amounting to acts of contravention, as an heir of tailzie, under the deed of 1720 (1688?)

" It is here necessary to state, that he was in fact heir of the old investiture in 1632, it is also necessary to take notice, that, in fact,

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1801. from 1736 down to near the period when he executed that deed, which throughout is called a deed of repudiation, he was in truth engaged in a suit, which was first decided in the Court of Session, and afterwards decided in his favour in this House, previous to the year 1740; that law suit was determined in his favour, and it was then adjudged by your Lordships that he was entitled to the estate in question.

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"My Lords, several questions have arisen in the argument, upon which it is not my present intention to enter, because I do not think them useful for the purpose for which I now rise. Several questions have arisen upon this part of the case; Whether, for instance, the taking possession, subjected him to the fetters of the entail? Whether, if his interpositions are to be imputed to his character of heir in tail, *that* would subject him? Another question has been, Whether an heir may not retract everything but an actual entry? Whether taking possession intimated anything more than an intention of entering?—and, if his intention should be altered, Whether the deed of repudiation itself amounts to a contravention? That is a point, which has been very painfully, very learnedly, and very ably discussed at your Lordships' bar, as well as treated of by the Court below.



"It appears that Sir Hew Dalrymple was likely to become entitled to another very considerable estate in Scotland, the estate of North Berwick; and some motive, the nature of which it is not necessary to discuss, had induced that part of the family to whom the property belonged, and who had the control over it, to manifest a disinclination that the estate of North Berwick should devolve to the same person. It was perceived that, according to the entail of Bargany, Sir Hew Dalrymple must take that estate; his grandfather did not think it fit that he should have the estate of North Berwick if he thought proper to take the estate of Bargany, and therefore the entail of North Berwick was reserved under limitations, which made that estate devolve upon the subsequent taker, which Sir Hew Dalrymple held for the possession of Bargany, according to the entail of that estate, when his right to accept the estate of North Berwick, relinquishing Bargany, ensued. But his grandfather had a power of dispensing, to the extent which he thought fit to dispense, with that intention, with respect to the estate of North Berwick; and the grandfather, thinking it might not be an imprudent thing for his grandson to have a very good estate, while he himself had another very good estate, does permit his grandson to take the estate of Bargany during the life of himself, the grandfather, but he provides, that if, at his death, he does not, according to the expression which he here uses, denude himself of the estate of Bargany, he should not take the estate of North Berwick; and I pass over this part of the case with barely stating, that my mind has never felt the least inclination not to adopt that proposition, in which the judges of the Court of Scot-

land appear to have been quite clear, and that is this, that if the subsequent takers of the estate of *North Berwick* had chosen to let Sir Hew Dalrymple enjoy both the estate of Bargany and North Berwick, then the *subsequent taker* of the *estate of Bargany* could not have quarrelled with that, because there was no clause whatever in the entail of Bargany that prohibited any heir of tailzie of Bargany from holding the estate of North Berwick.

"Under these circumstances, Sir Hew Dalrymple executed the deed of April 1736, of which your Lordships have heard a great deal in the course of the argument which has been addressed from the bar; and the result of these deeds appears to me to be little more or less than that which I have stated. I hope, in a very few words, to express my construction of these instruments to be the mode, and the only mode, which the Lord President could take to secure the full enjoyment of the two estates, to exercise his power over the North Berwick estate, and not to exercise any power he had not, or to prescribe any thing relative to the enjoyment of the Bargany estate.

"The Lord President died in the year 1737. At that period your Lordships will have observed, from what I before stated, that the suit and title to the Bargany estate was not concluded, and therefore Sir Hew Dalrymple, the son, by the death of the President, came to this situation, that the Bargany estate opened to him if he was entitled to it, and the North Berwick estate, if he was entitled to that;—he was put at least under the difficulty, that he could not very well state in what manner he was decisively to act, till the suit relative to the Bargany estate should be concluded, and that being so, his intermediate acts may in some degree be accounted for by that circumstance. That suit concluded in 1759 or 40, and in the year 1740 Sir Hew Dalrymple executed a deed, of the 13th August, to the following intent. (Recites the principal clauses of the deed as follows:)

"That having duly considered the foresaid tailzie of the estate of North Berwick, contained in the aforesaid contract of marriage, and also the tailzie of the estate of Bargany above mentioned, dated the 19th day of June 1688, and that it appears to have been intended by the parties to the contract of marriage betwixt the said Sir Robert Dalrymple and Mrs. Joanna Hamilton, my father and mother, that the said two estates of North Berwick and Bargany should be separately taken and possessed by the heirs of the marriage betwixt the said Robert Dalrymple and Mrs. Joanna Hamilton, except in the cases therein excepted, and that in case I should now take the succession of the estate of Bargany, I would thereby forfeit the right to the estate of North Berwick, for myself and my descendants, in favour of John Dalrymple, counsellor at law, my brother german; and I being fully resolved to take and hold the estate of North Berwick, and to allow the estate of Bargany to de-

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1801. scend to and to be taken by the said John Dalrymple or Hamilton, in terms of the entail of the estate of Bargany, therefore, and for the love and respect which I have and bear to the said John Dalrymple, and in consideration of the settlements of the estates of North Berwick and Bargany above recited, wit ye me with and under the provisions after mentioned, to have repudiated, like as I by these presents do repudiate, and refuse to accept of the succession of the said estate of Bargany, and that to and in favour of the said John Dalrymple, the next heir of tailzie in the said estate of Bargany, and I consent that the said John Dalrymple shall, in respect of my repudiation aforesaid, serve himself heir of tailzie and provision to the said James Lord Bargany, and otherwise make up titles in his person to the said estate of Bargany, in such manner as is competent to the law, and as he shall be advised, and that the said John Dalrymple do instantly take possession of the said estate of Bargany, and uplift the rents thereof in the tenants' hands fallen due since the death of the said James Lord Bargany, and in time coming.

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" Your Lordships will perceive, by a proviso I am now about to state, that he was extremely reluctant to do any act, which, if it could bind himself, should bind his descendants; he seems to have looked first to those events in which it would be possible either for him or his issue to hold both estates, and he concludes this instrument with this proviso: ' Providing always that these presents shall ' no ways prejudice my own or my descendants' own right to take ' the succession of the said estate of Bargany upon failure of the said ' John Dalrymple, and Dr. Robert Dalrymple, my third brother, or ' in case any event shall exist in which I, or my descendants, can ' take the said succession, consistent with the foresaid tailzie of the ' estate of North Berwick, with which express provision these presents are granted by me, and accepted by the said John Dalrymple.'

" Your Lordships observe the effect of this act was preferring one brother to another. It might certainly have brought forward a period at which the appellant would be entitled to enjoy, provided it happened that Sir Hew Dalrymple's issue could never reinstate themselves, but if they could, in another order, I now consider this act, so far from being injurious, that it would have brought forward her (Mrs. Fullerton's) title to enjoy the estate; and, on the other hand, would have left it to commence precisely at the same period as if these acts had never been done; the contravention, therefore, which Mrs. Fullerton alleges, is not a contravention by which injury is done to her, but an injury done to the intention of the author of the gift of the whole.

" After this John Dalrymple, the second brother, assumed the name of Hamilton. Here I should take notice that Sir Hew Dalrymple, as he then was, when he drops the possession of the estate,

ceasing that pre-exemption of the estates, and giving them to John Dalrymple, he likewise drops the name and arms; and one of the clauses in the entail was this, that he was to take, and use and keep the name and arms. John took the name and arms, and he took the possession of the estate of Bargany as heir; and, in order to pave the way for making up a feudal title thereto, he brought a summons of declarator in the Court of Session, which, after setting forth the entail of Bargany, the competition relative to the succession, with the judgment of the House of Lords, and particularly the above mentioned deed executed by Sir Hew Dalrymple, and then the summons concluded that it should be found and declared, by decree of the Lords of Council and Session, that the said John Hamilton, pursuer, hath the only right and title to the succession of the estate of Bargany, and that he ought to be served heir of tailzie and provision to the said James Lord Bargany in the said lands and estate of Bargany, comprehending the several lands, baronies, and others contained in the tailzie made by John Lord Bargany, in the contract of marriage betwixt the said John, Master of Bargany, and Mr. Jean Sinclair, after the form and tenor of the writs before narrated, and laws and practice of this realm, used and observed in the like cases in all points.

"The defender called in this action made any appearance; a decree was pronounced in absence, and this decree having been pronounced in absence, as far as I collected from the language of Mr. Erskine, in his argument referring to it at the bar, was to be taken as next to nothing, though it was certainly a judicial proceeding in the cause of high authority in this respect, I mean high authority as affecting the title to the estate,—I do not mean a proceeding of high authority, as conducted with the view and judgment of the Court, industriously called for, and elaborately bestowed upon it, but the Court found the points and articles of the foresaid summons relevant and proven by the writs aforesaid produced, and found and decerned and declared, conform to the conclusions of the libel.

"After this Mr. Hamilton expedited a general service, as heir of tailzie and provision to James Lord Bargany, and thereafter resigned the estate of Bargany, by virtue of the procuratory of resignation contained in the entail of 1688, which had not yet been executed, and thereupon obtained a crown charter, granting and confirming the estate of Bargany to him, the second son of the deceased Robert Dalrymple, the counsellor, by the only daughter of the deceased John, Master of Bargany. It runs in these words:—*'Dilecto nostro Joanni Hamilton de Barganie jurisconsulto filio secundo demortui domini Roberti Dalrymple de Castletown procreato inter illum et demortuam dominam Joannam Hamilton amicam filiam demortui Joannis magistri de Barganie et sic hæredem fæmellam demortui Joannis domini Barganie ejus avi et hæredibus quibuscunque ex corpore dicti Joannis Hamilton quibus deficientibus aliis*

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 'ton procreatis inter illam et dictum dominum Robertum Dalrymple
 FULLERTON, 'absque divisione; quibus deficientibus aliis hæredibus fæmellis ex
 &c. 'corpore dicti demortui Joannis Domini Barganie absque divisione
 v. 'hæres fæmella natu. maxima et descendentes ex ejus corpore omnes
 HAMILTON. 'alias hæredes portionarias semper excludentes, et absque divisione
 'succedentes, quibus deficientibus hæredibus masculis ex corpore
 'nunc demortui domini Joannis Houston,' &c. I have taken this in
 the very terms of it, because the argument proceeded upon an assertion
 that this was in truth a grant to John, and the heirs proceeding from
 him, and then a grant to the other heirs of tailzie, they meaning by
 the words, other heirs of tailzie, those other heirs who are to take
 subsequent to John, and upon this conclusion, that the deed of 1780,
 the contents of which I must state shortly presently, was a contra-
 vention on the part of John of the old entail of 1688.
- "Mr. Hamilton's title to execute the procuratory in the entail of
 1688, upon which the charter proceeded, is stated thus, 'Et ad
 'quam procuratoriam resignationis et terras aliaque inibi contenta
 'demortuus Jacobus dominus Barganie postea jus habuit tanquam
 'hæres talliæ et provisionis in generali cum beneficio inventarii ser-
 'vit. et retornat. dicto demortuo Gulielmo domino Barganie ejus patri
 'secundum ejus servitium de data duodecimo die mensis Julii
 'anno domini 1712 ad cancellariam debite retornat Et ad quam
 'procuratoriam resignationis terras aliaque inibi contenta dictu
 'Joannes Hamilton de Barganie nunc jus habet tanquam hæres
 'talliæ et provisionis in generalis servit et retornat. dicto demortuo
 'Jacobus Domino de Barganie secundum ejus generale servitium
 'coram balivos vici canonicorum de data duodecimo die mensis Sep-
 'tembris anno domino millesimo septingentesimo quadragesimo primo
 'ad canellariam debite retornat. Et quod generali servitium dict.
 'Joannis Hamilton constabatur. et auctoritate munitur per judicium
 'dominorum cum spiritualium et temporalium in parlamento convo-
 'catorum de data vigesimo septimo die mensis Martii anno domini
 '1739 (here the judgment of the House of Lords is recited) Et per
 'quoddam scriptum die deed per dictum dominum Hugonem Dal-
 'rymple concessum de data decimo tertio die mensis Augusti et
 'registratum in libris Concilii et Sessionis undecimo die mensis
 'Novembris anno domini 1740 et per quod repudiavit et recusavit
 'accipere successionem dict. status de Barganie et hoc ad et in favo-
 'rem dicti Joannis Hamilton proximi hæredis talliæ in dicto statu de
 'Barganie concordavit quod dict. Joannes Hamilton (in respectu ejus
 'repudationis prædict.) seipsum hæredem talliæ et provisionis dicto
 'Jacobus domino Barganie inserviet eo modoquo de lege com-
 'petit.' &c. So that it puts his character of heir of tailzie upon the
 circumstance, that he is heir of tailzie, because Sir Hew Dalrymple
 ceased to be connected with the estate, and because that connection
 ceased in the operation of the deed which Sir Hew Dalrymple had

executed. It is observable, that this decree in absence proceeds upon a state of things which certainly takes no manner of notice of the reservation of Sir Hew Dalrymple himself, and the heirs of his body. In the cases put in the deed, it is observable, that it does not take any notice of that proviso, by way of reservation, and though Sir Hew Dalrymple was in life, it treats him as if he were dead, and dead without issue of his body.

“ Upon this part of the case, your Lordships will recollect that a great many very considerable questions, as affecting the law of Scotland, have been made in argument, and have been very elaborately treated at the bar. In the first place, it has been insisted that John Dalrymple, thus treated by Sir Hew Dalrymple, his brother, in this disposition of the estate, was accessory to a contravention, and that his brother Robert Dalrymple and he ought to have taken some step to compel Sir Hew Dalrymple either to abide by the terms of the entail, or quit any benefit under the terms of the entail. On the other hand, it has been insisted (and that opinion has been adopted by the majority, if not all the Lords of Session), that no such obligation rested upon Sir Hew Dalrymple; that there was no proviso in this deed against Sir Hew’s lying out unentered; that this deed of repudiation is not a deed of disposition, and that if John Dalrymple had taken any step whatever against Sir Hew Dalrymple, even after he had executed the deed, and after John, under the effect of this deed, and by his co-operation to effect this legal juggle, as it has been aptly enough called, if John had instituted any suit in Scotland to compel Sir Hew at any period of his life, to do any act, that it would have been competent to Sir Hew on the one hand to have said, I will take the estate notwithstanding the repudiation. If it is a contravention, it has been purged of that contravention, and that I will take the estate. But he might have said, in as much as I have a right to decline the possession, in as much as I am an heir of entail, not called upon by the terms of the entail to enter, I am not bound to enter by the terms of the entail, and I will not intromit with the rents of the estate, but during such period of my life, if in any period of my life, I shall think proper to intromit with the rents of the estate. And it has been sanctioned by very strong and judicial authority, that this on his part would have been a sufficient answer to any charge against John, of committing contravention, in the not calling on Sir Hew Dalrymple to do an act, because it is said Sir Hew would not have been bound to answer that call, or to have made good any claim which John would have made upon him.

“ The same sort of answer has been given to the circumstances of Sir Hew Dalrymple’s dropping the name and arms, that he had a right with the possession. (that possession not being perfected with an entry)—he had a right with the possession, if he thought proper, to use the name and arms; and when he relinquished the use of the

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name and arms together with the possession, to do so without contravening ; and if the relinquishing the latter was not a contravention, the ceasing to use the name and arms also was not a contravention. Infestment followed upon the proceedings I have last mentioned, so that the title seems to have stood in actual enjoyment till the year 1780. And in the year 1780, John Hamilton, probably foreseeing he was likely to leave the world without any issue of his own, executes a settlement of his estate of Bargany, by which that estate was limited to himself and the heirs male of his body ; whom failing, to Sir Hew Dalrymple, Bart., and the heirs of his body without division ; whom failing, to the next heir of the body of the said John Lord Bargany, and the other heirs of tailzie contained in the said deed of entail, executed by the said John Lord Bargany in his son's contract of marriage, of date the 19th June 1688, in the order therein expressed, and which heirs of tailzie are hereinafter inserted. And upon this disposition, infestment was taken ; and upon this deed it is said that this was a contravention on the part of John, Sir Hew having forfeited by his contravention, Sir Hew forfeited for himself and for the heirs of his body. John's titles were made up in the year 1742, under instruments which bound John to take care of the interests of all the subsequent takers in the entail of 1688 ; for conceiving Sir Hew and the heirs of his body to be discharged out of that entail as if they had never therein been named, and, therefore, that the introduction of Sir Hew upon the failure of the issue of the body of John in this deed of 1780, is a contravention on which Mrs. Fullerton has a right to found the present action as against John, and, therefore, it has been contended, that in the present action, *that deed* may be considered as a contravention, and insisting, as to it, for having it reduced as far as there is any title in Sir Hew, and the heirs of his body.

“ That has been strongly contended for upon many grounds and principles, your Lordships have heard—laying the foundation of the argument deep in some of the most abstruse points in the law of Scotland—and this answer seems, on the other hand, generally adopted by the Lords of Session, That the deed of 1740 having reserved to Sir Hew Dalrymple, and the heirs of his body, a right to claim, if there should ever hereafter arise a set of circumstances under which he, or they, could enjoy both estates, that this deed might have proceeded upon mistake. In the first place, it did not proceed upon a mistake, but they say, it might have proceeded upon a mistake, on the part of John Dalrymple accepting the succession under it ; and if it was founded in mistake on the part of John, it was a contravention purgeable, because founded on that mistake, and which contravention John might have got rid of, by setting the mistake right at any period of his life.

“ These being the circumstances of the case, with the addition, that John Dalrymple was charged with having been guilty of contraventions of the limitations of this estate, by certain adjudications

in reference to his proceedings, upon which he had sold and disposed of that part of the estate, it was contended upon these several grounds that Mrs. Fullerton was entitled to take the estate. I will just hint a single word to your Lordships upon the matter of the adjudications. That it appears to me that the contravention alleged to have taken place, with reference to these adjudications, cannot be sustained. The answer I see was given in the Court below, and I believe none of your Lordships will have any doubt but it was satisfactory, as far as the objections were founded.

“Under these circumstances, and stating this sort of title, Mrs. Fullerton brought her summons in Scotland, and your Lordships will recollect that she insisted, under these circumstances, that Sir Hew Dalrymple, and his children, being, I think, *eight* in number, were to be considered as not standing as the substitutes in this entail. She insists that she had a right to have John's forfeiture declared, and his forfeiture, for himself and his heirs, adjudged by the Court,—to have all these deeds reduced; and under some title, accruing out of the old entail, and the effect of all these transactions accumulated, to have a right asserted in her to take the immediate possession of the estate, as if Sir Hew Dalrymple and John Dalrymple, and their natural descendants, were actually dead. This being the prayer of her summons, the defender, Mr. Hamilton, produced the crown charter which was expedited in the year 1742, with the infestment that followed upon that crown charter; and he asserted that, upon these, he had been more than forty years in possession,—that this therefore was a preferable right sufficient to exclude the title of the pursuer, and that he was not bound to make any further productions.

“In answer to this, it was contended on the part of the pursuer, that let the effect of the infestment and the forty years' possession be what it might, it could not be a good title to exclude the title of the pursuer, if the pursuer had any title, because the pursuer, by law, was authorized to deduct from the years of possession the years of her minority. This appears to have been very elaborately considered in the Court of Session. It will be in your Lordships' recollection, that it was most ably argued by all the counsel at the bar, myself excepted; but I argued it, with what industry I could—that it was very painfully considered by some of your Lordships, particularly the learned law Lords then in the House,—and that the Court of Session were of opinion, at least the majority of them were of opinion, that, under the circumstances, Mrs. Fullerton was entitled to deduct her years of minority. Some were of opinion that she was entitled to deduct her years of minority, assuming her to be the nearest substitute. Others were of opinion that she was entitled to deduct her years of minority, whether she was to be considered as the nearest substitute, or as a remote substitute. Some thought that the years of minority could not be deducted. Others thought that the near-

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est substitute might deduct them. Others thought that the nearest might, but the remote might not. Others thought that both the nearest and remotest might; and, under these circumstances, the first decree of the Court of Session came before your Lordships.

"It will be in your Lordships' recollection, that when the case came for argument upon the appeal from that decree, that it was necessary, at least in some degree, in order to make the case intelligible, to state at your Lordships' bar, what was the title insisted on by Mrs. Fullerton, and that title was stated to be such as I have had the honour of representing it to be to your Lordships to-day, and it was asserted at the bar by those who were counsel against Mrs. Fullerton, that it was no title; but it was alleged to be the course of proceeding in Scotland to assume the facts as proved, and to assume the law. I should have thought certainly, that no law was to be assumed but such law as was the result of the facts that were to be assumed; that it was one thing to say this, that if your facts be true, the law of the land is so and so; and another thing to state, if your facts be true, the law shall be just what you please to represent it to be, we knowing that the law is directly other than you represent it to be; but, indulging you in the assumption you were pleased to make, instead of stating anything as to the law which you assume, we, in the first instance, will address ourselves to consider the title to exclude, founded on prescription by the defender; and instead of beginning, at what I dare not presume to call the right end, but at the English end of the cause, that is, with the plaintiff's title, to begin at the latter end of the cause, and to dispose of the latter end of the cause first, though it may be that in the beginning of the cause there is nothing alleged to be disposed of. It was, however, stated that such was the practice of the Court; and I am sure there is no person less able to inform your Lordships what the practice of the Court is than I am, and no person less disposed than I am to observe upon the practice of any Court; because I have lived long enough to know that it is not in the reason of individuals that you are sure that you get to a right conclusion, when you are arguing upon the propriety or impropriety of measures that are taken, if you are disposed to acquiesce in an opinion that *that* which has been found in past ages to be convenient and right, may be convenient and right though you cannot immediately see the grounds upon which it is founded. But I observe here, that the two noble and learned Lords agreed in opinion at that time, which opinion they submitted to your Lordships, and which opinion your Lordships, as I understand, distinctly adopted; namely, that there might be a great difference between a case in which, if the facts were true, and the law arising out of those facts were such as, grounding reasons upon those facts, the pursuer had a right to the relief which she prayed in her summons; and though that statement, entitling her, if her facts were true, and entitling her if her facts were not true, but facts furnishing

law which she propounded, to call for the production of title deeds, and so on, that there is a wide difference between saying it is extremely convenient and absolutely necessary, and never to be departed from.

"If you were then to enter first into the question of the defender's title, and say this, This defender, if he can state a short exclusive title, shall not be called upon to open his charter chest, and indulge the pursuer in any investigation of all his title deeds, in that sort of case, one can easily see why the prescriptive period stated in a defender's title should first be gone into. But if there should happen to be a case, in which the pursuer really states no title, in short, in which he states, *that* which I say is no title, if the law will say it is no title, then the pursuer, stating that set of facts, and raising an assumption of law which belongs only to that state of facts, ought to have her title first considered. It did not occur to me, I own, at that time, and I humbly state to your Lordships that it does not occur to me now, that it is possible that any of that inconvenience can follow, which it was supposed by the Court below would follow, if you did not go first into the exclusive title. I am ready to state this, that if it shall appear, upon the examination of the pursuer's title, that the pursuer has a title, as she states it, then the shortest way in which the defender can plead, in bar, as we should say in our Courts in this country, is the best way for the administration of justice, and you shall dispose of that plea in bar; *i. e.* you shall affirm that this exclusive title, so pleaded in bar, is bad, before you shall give the pursuer leave to see a single paper of the title of the defender. But why is the defender to be put to the necessity of pleading in bar, and arguing his plea in bar, or exclusive title, through ten long years? for such is the case here, if, upon calling the judicial eye of the Court to the statement made by the pursuer, it is found the pursuer has not stated a title, whether there be a title in the defender or not.

"This is a very familiar practice to my mind. It does often happen in the courts of this country, that a plaintiff in a suit states a set of facts, where there is not a single word of truth at the bottom of his statement; but a set of facts, which, if taken to be true, raise propositions which the law of the country require you to apply to that statement of facts, and a defendant can get rid of that false statement no other way with convenience, than by pleading somewhat in bar, if he has anything upon which he can rest a plea in bar. For instance, a man files in the Court of Chancery here (which in some respects is like the Court of Session), what is called a fishing bill. He states a very handsome title to himself, deriving the estate to him, and then insisting that, being heir in the manner he has mentioned, he has a right to the estate. That he has all the rights of an heir, and craving to see the title deeds, whether he is

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divested of those rights which belong to him as the heir ; but the court must take it to be true in the first instance, and then the defender must deal with it as he can. If he has any title which he can say is exclusive, this is a plea in bar ; because, supposing all that to be true, here is a fine levied—here is a deed of sixty years. If he cannot do that, he is obliged to answer the whole.

“ But put the case the other way. Suppose he stated a title, as consisting of facts which a judge, throwing his eye upon it, would say, ‘ Well, if this is all true, it is irrelevant—it forms no title against the defendant—it forms no title against anybody’ ; the defendant has a right to call upon that judge to exercise his judicial mind upon that state of facts, by a process which we call a demurrer. You examine the case of the plaintiff first, and if there is nothing in it, you never take the trouble of examining the case of the defender, because *his possession* is against a man who shows himself to have no right to possession. I hope I am correct in saying, that whether this be right in reason or wrong, it becomes me to say, that it is right in reason, for I feel that, according to my view of your Lordships’ remit, *that* was the view of the case when you made the remit.

“ Now, what is the remit ? It is this, That it is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, that the cause be remitted back to the Court of Session in Scotland, to review the interlocutor appealed from, and to consider how far the validity of the title to exclude, set up by the defendant, is in this case involved with the title set up by the pursuer, to sustain the action of reduction and declarator, as having become the nearest substitute under the deed of entail, in the manner alleged in her behalf. And if the Court shall hold these questions to be in this case involved with each other, that they do pronounce an interlocutor for or against that title, that is, for or against the pursuer’s title, and also on the effect that such judgment may have upon the interlocutor to be reviewed.

“ The meaning of your Lordships’ remit, I take to be this, That the Court of Session were to consider how far the validity of the title to exclude set up by the defendant is, in this case, involved with the title set up by the pursuer, that is, be the title to exclude valid or not valid, if that title is not involved with the title alleged by the pursuer—that is, if the title alleged by the pursuer be no title, then the title to exclude is not involved in it. If, on the other hand, the title of the pursuer be a title, then the title to exclude is involved in it, and you will order an interlocutor accordingly. If you find the pursuer has no title, you have no further duty with respect to the defender’s title. If you find the pursuer has a title, then you are to enquire into the validity of the obligation of the defender, which will include all this, and whether, in that case, Mrs. Fullerton is the nearest substitute, or the most remote substitute,—whether, if the nearest, she has the title to deduct her years of minority

and also a title*

and then, if you find there has been a contravention on the part of the pursuer (defender?) you will say, what is the effect of the title of the defender, regard being had to the years of minority, as allowable or not allowable, upon the title arising out of the contravention at this day? And this interlocutor, most undoubtedly understood, (if I am wrong in this, the learned Lord who sits by me will set me right; but as I understood this interlocutor at the time, and have understood it ever since, it was your Lordships' meaning), that the Court of Session should decide whether the pursuer has a title or not. If they decided that the pursuer had a title, then they were further to decide, whether, under the circumstances of the case, the exclusive title was good to exclude, attending to the contravention as applying to the circumstances of these persons.

"Under this remit, the cause went back to the Court of Session; and I really hardly know in what terms I shall do justice to that Court, with respect to the great attention which they have given to the subject. The cause has been most elaborately argued, most patiently heard, and diligently considered by their Lordships; and in the consideration of it every question relative to the point, whether the pursuer had a title or not, has been investigated, as far as I can judge, to the bottom, decided upon in fact, but yet the interlocutor came back, not saying a word upon the pursuer's title, but still saying that the defender has an exclusive title, and a preferable title. The language of the interlocutor, therefore, unless it can be sustained by a reference to a practice which I am not master of, is language which seems to admit (though the majority of the Court deny that) that the pursuer had a title. But whether the language of this interlocutor be right or wrong, I feel it my duty to state, that it is not an answer to your Lordships' remit, as I construe your remit, because, whether it may be proper that *that* remit should be made or not, is one question; but a remit having been made, your Lordships will expect it to be answered. Then there is no answer to the question, Whether the pursuer had a title? This answer implies, that if the pursuer had a title, there is an exclusive title on the part of the defender. You cannot imply, as it appears to me, from this answer, that there was a contravention, or that there was not a contravention; or that, if there was a contravention, that contravention was purged; or that, if there was a contravention, it ought not to have been proceeded upon to the length of declaring it.

"You cannot imply in this interlocutor what the Court held about the deed of repudiation, whether they held it to be a deed of disposition or not;—whether, if a deed of disposition, they held it to be an act of contravention; and whether, if they held it an act of

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* The blank occurring in this speech arises from the short-hand writer not hearing the words spoken.

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contravention, they held it to be an act of forfeiture. You cannot collect any conclusion of that sort with respect to the deed of 178 nor with respect to any one of the acts or deeds of Sir Hew Dalrymple, John Dalrymple; and the Lords of Session have been of opinion, from what we know of the judgment, that, under the circumstances, there either was no contravention, or if there was a contravention, that it was purgeable, and if purgeable, there ought to have been a precise declaration upon it after the death of Sir Hew Dalrymple; and the Court of Session were, upon the whole, of opinion that the putting of the one before the other was no injury to Mrs. Fullerton, and that her interest, standing at the moment in which she comes for a judgment, in point of enjoyment and in point of benefit, precisely and exactly as it would have stood, if none of the acts had been done. They seemed, I think, unanimously of opinion with the exception of a single Lord, who did not give his opinion upon the subject, that the pursuer, at the time she is pursuing, has no title, therefore the interlocutor does not do justice upon your Lordships' idea upon that subject; and, with respect to this particular case, it does not do justice to what I take to have been the ideas of your Lordships, when you addressed this remit to them.

"With respect to the question itself, Whether Mrs. Fullerton has or has not, a title? I am very free to state to your Lordships, that my mind is impressed, very strongly impressed, with this idea, that when the author of a deed, be it a deed or will, has prohibited any particular act to be done, that it belongs to the disponee in that deed to take the property as it has been given to him, and that he has a right to alter, innovate, or change, (if the fact done be an alteration, innovation, or change prohibited), merely because he had reason to think it was more or less injurious to those who are to take behind. It is the duty of those who take under a deed, to observe the terms of the deed. And I will not state to your Lordships, that if these things had been *res integra*, being, in my opinion, a positive prohibition by the author of this deed, that the second son of his family and his descendants, should not take his estate before the first son of his family and descendants; there are many considerations that may fairly influence the heart of a parent to make a limitation of this sort in a deed beyond that; but, beyond that, there are many considerations of policy, and I do not know that it is possible to reason, according to the notion of an English lawyer, that an eldest and second son shall say, that they are not defeating the will of the parent, when they are making the eldest the second son, and the second son the eldest. If this had been *res integra*, many of the doctrines contained in this case are doctrines which it would be difficult to sanction.

"But, having given the most painful attention which I could to this cause, and to all the law which I can find upon this subject, and had recourse to the authority of those who are dead and those who

are living, upon the subject, it does not appear to me that I should act faithfully to your Lordships, or according to my own feelings, if I presume to say that, under all the circumstances of the case, I could represent the pursuer to your Lordships as having a title. Under these circumstances, it has appeared to me to be my duty to state the facts of the case in detail to your Lordships, rather for the purpose of stating why I think the interlocutor must be *altered*, in order to make it a compliance with the terms of your Lordships' remit, than to intimate that I can, however anxiously I have thought upon this subject, induce myself to think, that as the law of Scotland has been settled, Mrs. Fullerton had a title to pursue, which she has stated in her summons. In order to make that interlocutor consistent with what I take to be the meaning of your Lordships, I should conceive that it would be necessary that your Lordships should make some declaration with respect to the pursuer's title, and, for that purpose, I shall beg leave to submit it to your Lordships.

1801.

FULLERTON,
&c.
".
HAMILTON.

"That this interlocutor be reversed, and that your Lordships should find, that the matters in Mrs. Fullerton's summons are not sufficient to sustain the conclusions in those summonses, or any of them. If I have mistaken the views of your Lordships in any former periods in this cause, I am sure I shall be set right by those to whom I have the honour of addressing my humble conceptions. It is a satisfaction to me that I speak in the presence of those,* of some of whom I am bound to say, that if I have any opinions which will be serviceable to the country, I owe it more to them than to any other cause."

The question put and carried.

Whereupon it was

Ordered and adjudged that the interlocutors complained of in the appeals be reversed. And it is declared and found that the matters in the appellants' summonses complained of, are not sufficient to sustain the conclusions in those summonses, or any of said conclusions; and therefore assoilzie defenders.†

For the Appellants, *Wm. Grant, Robt. Blair, Wm. Adam,*
David Cathcart.

For the Respondent, *Henry Erskine, Thomas Thomson.*

* Lord Thurlow present, Lord Rosslyn absent.

† Mr. Napier, in his recent work on Prescription, has some comments on this case, as disposed of in the House of Lords, p. 507, last edition. But, on more mature consideration, perhaps, the "confusion" which he alleges to have occurred may be found to disappear. In regard to Lord Thurlow's remit back to the Court of Session to re-

1801.

<p>PLASKETT, & c. v. STEWART, & c.</p>	<p>THOMAS PLASKETT and Others, Creditors of the York Buildings Company, and also the York Buildings Company, and JAMES BREMNER, W.S., Common Agent on the Co.'s estates, DAVID STEWART, Esq., and JOHN MORRISON, W.S., Trustee on his Sequestrated estate,</p>	<p>{ }</p>	<p><i>Appellant</i> <i>Respondent</i></p>
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House of Lords, 18th June 1801.

EVICION OF LEASE—DAMAGES—PROCESS—(1.) Circumstances which it was held by the Court of Session, that a tenant, whose lease was reduced, and his possession evicted from him, was entitled to damages against the grantors of the lease. Reversed the House of Lords, on the ground that there was fraud in the transaction from the beginning. (2.) In this claim of damages and before any sum was declared to be due, the Court, on motion to that effect, decerned in terms of the conclusions of the libel, the effect of allowing adjudication to be led against the heritable estate, reserving all objections *contra executionem*.

This was a claim of damages brought by the lessee against the lessor, for the eviction of his lease, which was reduced.

Lord Swinton's own notes in Compiler's possession.

consider the case with reference to the pursuer's title, the propriety of that course was acknowledged by many of the judges in again considering the question, and was justified by the result, because their Lordships altered their former interlocutor on the question remitted. Besides, on the first consideration of the cause before the Court of Session, it was anxiously pressed by Lord Swinton, one of the judges, thus: "The question here relates to the defender's title to exclude; but I think there is a previous question, viz. the pursuer's title to insist, which should be first considered, as, in case it shall turn out the pursuer has no title to insist, what signifies considering whether the defender has a title to exclude?" And there are strong grounds for believing that this want of title on her part lay at the basis of the Lord Ordinary's famous interlocutor, for, according to the notes of what he said, on advising it before the whole Court (Dec. 1796), the following appears: Lord Justice Clerk M'Queens "The judges have settled that the minority of the first substitute upon whom the settlement would fall or devolve, is to be deducted. This construction is just on the act 1617." "But I cannot admit that Mrs. Fullerton is next substitute. Her right must first be declared." No doubt, at this stage of the cause, it might have been held, what undoubtedly had actually taken place, that Mrs. Fullerton's title had already been disposed of by the Court below, both because *that* is the usual

and set aside, at the instance of creditors, on the ground of covin in the transaction, and fraud to the prejudice of creditors. The case is reported *supra*, Vol. ii. p. 500. 1801.
PLASKETT, &C.
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The York Buildings Company's estates in Scotland became the subject of a ranking and sale; and, in this process, the whole creditors were ordered to produce their respective interests.

At this stage, and of this date, the Duke of Norfolk, and other creditors, presented a petition to the Court, setting forth, that it was the interest of all the creditors, that the estates should be managed in a proper manner,—the Dec. 1744.

course in such actions, and also because the discussion of the title to exclude necessarily involved the discussion of her pretensions to be nearest heir substitute. This was pleaded to Lord Thurlow, but his Lordship could not understand how this could warrant the Court below to assume, that Mrs. Fullerton possessed that *status*, and to proceed upon that assumption, against the facts stated in her summonses, which did not warrant that assumption. Had it been a fact assumed, until proof of the fact was established, there would have been principle to support it; but here, where Mrs. Fullerton stated her facts in her summons, and deduced her title from those facts, it was thought that every thing was patent and ripe for immediate consideration of that point, without proceeding upon any *postulatum* of assumed fact or law.

The question itself, Whether a first heir substitute of entail may plead minority? was left precisely where it stood before the *Bargany* case,—with this difference, that a majority of the Court, on two most deliberate considerations of the subject, and after a thorough examination of the previous decisions, came to the conclusion that the first heir substitute of entail may plead minority. The Lord Justice Clerk M'Queen, who was the Lord Ordinary that pronounced the interlocutor finally adhered to, confessing, on the last advising, that this was a just construction of the act 1617. So, at least, the notes taken by one of the judges in the compiler's possession set forth; and they do not in substance differ from the notes published as an appendix to Wilson and Shaw's Appeal Cases, Vol. I., where he is declared to have said:—"The point was somewhat puzzling; but our courts of law, upon a mature consideration of the whole case, adopted a modification of the act 1617. They found that the deduction of minority was to be allowed only to the *verus dominus*, or to the heir apparent who is entitled immediately to take up the estate; but not to substitutes under an entail, whose interest is merely contingent."

1801. farms and estates let at proper rents, not below value,—and
 PLASKETT, & C. the rents levied therefrom, applied in extinction of the pre-
 v. ferable debts, none of which were attended to under the
 STEWART, & C. present management ;—that, in particular, the Company con-
 tinued in the practice of granting leases, and the petition-
 ers are “ informed there are at present subsisting several
 “ leases of the Company’s estates at an under rent, obtained
 “ by favour of the manager ; and that, by the same method
 “ prorogations of the subsisting leases have also been ob-
 “ tained.” And therefore praying the Court to sequester
 the estates, and to name a factor with the usual powers.

Dec. 1744. Pending this application, and between the date thereo
 and the interlocutor pronounced thereon by the Court, o
 June 15, 1745. this date, prohibiting the granting of leases, and sequestrat
 ing the Company estates, several leases of the nature o
 prolongations were granted, and, among the rest, one to Dr
 Fordyce, which gave rise to an action of reduction. The
 lease was reduced by the Court of Session, and their judg
 April 16, 1779. ment, on appeal, was affirmed in the House of Lords.

After this decision, Dr. Fordyce took no step until 1794
 when he raised the present action of damages for eviction c
 his lease, reciting the lease granted in April 1745, and h
 own possession and that of his predecessors under it, un
 the term of Whitsunday 1779, also reciting the action of r-
 duction and removing raised by the creditors, issuing in t
 judgment of the Court of Session reducing the lease, as a
 firmed in the House of Lords ; and setting forth, furthe
 that in consequence of said judgment, so affirmed, the lease
 was removed from possession of the said lands in the ye
 1779, when there was ten years of the lease so granted sti
 to run—that the complainer, as heir to his brother, was en
 titled to succeed to the lease, and to hold and enjoy the
 lands until the expiry of the same ; but, in consequence of the
 lease being reduced, the lands let were evicted from him,
 and as, by the terms thereof, the York Buildings Company
 came under absolute warrandice of the lease, the pursuer
 was entitled to damages for the loss sustained by this evic-
 tion, and concluding against the Company for £12,000
 sterling of damages.

After the disposal of some dilatory defences, the Lord
 Nov. 16, 1797. Ordinary “ decerned against the defenders, conform to the
 “ conclusions of the libel, *reserving to the defenders all ob-
 “ jections contra executionem*, and answers thereto, as ac-
 “ cords.” On reclaiming petition, the Court pronounce

This interlocutor:—"In respect that by the interlocutor
 reclaimed against, nothing is determined with regard either
 to the validity of any claim of damages upon either side,
 or to the amount of such claims, refuse the petition, and
 adhere to the interlocutor of the Lord Ordinary."*

1801.

PLASKETT, & C.

v.

STEWART, & C.

June 6, 1798.

The Company acquiesced in this interlocutor, as its effect
 was only to enable the pursuer to lead adjudication to be
 produced as an interest in the ranking, leaving the merits
 of the claim to be afterwards determined. The pursuer
 having entered his claim accordingly, he there maintained,
 that both by the implied warrandice which existed in every
 lease, and by the clause of absolute warranty contained in
 the lease itself, the York Buildings Company were liable to
 the lessee, or his representatives, for the damage and the
 loss he had sustained by the possession having been evicted
 from him, prior to the stipulated termination of the lease,—
 that although the lease of Belhelvie was reduced upon ob-
 jections stated by the creditors, yet the Company would not
 avail themselves of these objections, because they were
 equally implicated with Fordyce, and no one can found on

* Opinions of the Judges :—

LORD PRESIDENT.—“This is a claim of damages on the warran-
 dice of a tack, which was set aside. The objections are very strong,
 as the reduction took place on acts of litigiosity, collusion, &c. This
 strong against both parties. The application to sequester, and to
 take the power of setting leases out of Company's hands, was then in
 dependence. The petition was lodged in December 1744, was advised
 with answers in January 1745.—Remitted to enquire into manner of
 letting leases on 19th January. Minute 16th February. Interlocutor
 14th June 1745. The petition was intimated to Strachey, who drew
 the lease as attorney for Fordyce. But the present question is, Whether
 the petitioner may not be allowed to take out decree of constitution
quo periculo, to the effect of adjudging, all objections being reserved?
 I think he may. At same time, his adjudication for a random sum
 of damages will be of little avail. If damages are at all due, it is
 a question if it be not against the managers of the Company, not the
 Company itself. The managers exceeded their powers, and acted
 illegally and fraudulently, the subject being then litigious; and the
 objection of litigiosity applies not only to the one party, but to the
 other. If not, the transaction would be good, and the lessee
 would be safe, though the granter of the lease might be liable
 in damages to the parties hurt by it. But it is a question, whether
 all this goes any further than the interest of the creditors; and whe-
 ther *quoad* the Company itself, the lease may not still be considered
 as good.”

1801. his own fraud. In answer, it was stated, that where a lease
 _____ had been obtained by the lessee through fraud on his part,
 FLASKETT, & C. and the lands evicted through that fraud, the tenant could
 v. have no recourse against the landlord—and that the lease
 STEWART, & C. entered into was a fraudulent and collusive transaction, by
 which the Company's managers had it in view to defeat the
 right of their lawful creditors, and Professor Fordyce, aware
 of the circumstances in which the Company were placed,
 availed himself of the opportunity to obtain a profitable
 lease to their hurt and prejudice.

March 5 and The Lords, of this date, pronounced this interlocutor:—
 8, 1799. “ Repel the objections pleaded for the York Buildings
 “ Company, and find them liable in damages to the claimant,
 “ David Stewart, upon the warrandice contained in the
 “ lease in question, and remit to Lord Meadowbank, in
 “ place of Lord Monboddo, to hear parties procurators upon
 “ the *quantum*, and also how far the claimant has a prefer-
 “ ence upon the funds of the York Buildings Company to
 “ any class of creditors, or can only operate his payment
 “ out of the Company's reversion.” An appeal was taken
 Dec. 17 and but afterwards withdrawn, and another reclaiming petition
 21, 1799. was presented, but the Court adhered.*

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The lease with Fordyce was a fraudulent and collusive transaction betwixt the Company manager and him, whereby he obtained an unfair advantage in the lease in question, to the prejudice of the Company. And as the lessee cannot reap the benefit of his own fraud—he is not entitled to any damages against the Company for eviction of that lease at the instance of the Company's creditors. The lease was reduced on the special ground of fraud and collusion, which is shown from the reasons of reduction on that head being sustained. And although it may be

* Interlocutor 17th December 1799.

LORD PRESIDENT CAMPBELL.—“ This interlocutor is right. For former notes. The York Building's Company were no parties to the reduction of the lease. It is not so much as pleaded that was reducible *quoad* the Company. There is no fraud; but strong circumstances of homologation on their part, and, on that ground the Company are liable; yet it has been said, this does not operate against creditors. Here all parties acquiesced for thirty years. Adhere.—Session Papers vol. 64.

mitted that absolute warrandice in a lease, whether expressed or implied, attaches to the acts or deeds of the landlord, or to the defects in his right; and that if the possession is evicted from the tenant, in consequence of such acts or defects, the landlord is bound to give him an equivalent for the loss he sustains by being deprived of such possession; still, the appellants hold it to be equally clear, that if the possession is evicted from the tenant on account of his own fraud in obtaining the lease, as in the present case, the landlord is not liable in warrandice. The Company may not be entitled to reduce the lease in consequence of their participation in the fraud, but it does not follow that they are liable in warranty to indemnify the lessee for the evicted possession, as if he were an innocent party, and the fraud which had been committed not one of his own seeking. But even supposing he were entitled to indemnification, it could not be on the footing here claimed,—namely, of demanding the whole sum of the stipulated rent which was known to be under the real value. Such might be maintainable where a grassum was given, but all that was here paid by Fordyce was a petty bribe to Mr. Pembroke, which was one of the proofs of fraud. In effect, this would be to give him £500 of rent for every year of the lease.

1801.

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Pleaded for the Respondent.—At the time the lease was granted, the situation of the Company, from diligence used against their estates by their creditors, was such as to render a lease by them, at that juncture of time, challengeable, though not such as to render every lease of theirs void, as appears from the judgment of your Lordships sustaining the lease of Fingask, which was of the very same date. The principal feature by which the lease of Belhelvie differed from that of Fingask, was, that the former was a prorogation, or a renewal of a subsisting lease, of which five years were yet to run. When a prorogation lease of this kind is granted, it is as good as any other lease against the lessor; and when successfully challenged by a third party having interest, the lessee's recourse against the lessor is entire, under the warrandice, to the full extent of the damage sustained. The objection which the law of Scotland has always sustained to prorogation leases, granted in circumstances like the present, is only where *third* parties challenge the right; but it never has been held that such objection is competent to the lessor himself. The grounds on which the lease was reduced in this case, were not fraud and collusion, but the state of the Company at the time the lease was

Lord Cran-
stoune's Credi-
tors v. Scott,
Jan. 4, 1757.
Mor. 15218.

1801. granted. The diligences of inhibition, adjudications against
 _____ the estate, &c. were the sole grounds. There is no evi-
 PLASKETT, &c. dence of fraud—the length and endurance of the lease did
 v. not amount to such, because, in the case of Fingask, a lease
 STEWART, &c. of 99 years was sustained in similar circumstances. Nor was
 there any evidence that Dr. Fordyce was apprised of the
 diligence out against the Company, but, even supposing he
 had been informed, there was nothing to prevent him from
 going into a lease with the Company, who knew as much as
 he did of its own affairs, and who was in perfect *bona fide* in
 the transaction, in so far as the Company was concerned.
 No constructive fraud, therefore, can be maintained, and no
 actual fraud is proved, although dark hints of it, such as
 their officer taking a bribe, have been averred. Nor is such
 fraud established by the inadequacy of the rent in the lease,
 as this affords no ground to question the lease. On the
 whole grounds, therefore, the obligation of the Company to
 indemnify the lessee for the eviction of the lease under
 their warrandice of the same, must stand unquestioned.

After hearing counsel,

LORD CHANCELLOR ELDON said,

My Lords,

“ This is a case, the particulars of which are, (Here his Lordship
 enumerated the particular circumstances of the case.)

“ The predecessor of Mr. Stewart had obtained a lease of the estate
 of Belhelvie, and which lease was charged by the appellants as
 fraudulent and covinous, and, on these grounds, the original lessee
 had been evicted, by interlocutors of the Court of Session, and affirm-
 ed on appeal, in the year 1779.

“ The interlocutors now complained of, have sanctioned a claim
 of damages for the eviction of the lease, as against the York Build-
 ings Company, on the ground of a covenant of warranty in the ori-
 ginal lease so set aside; but, as I cannot assent to hold, that any
 claim of damages arises in this case, I move your Lordships to re-
 verse the interlocutors, on the ground that the claim arose out of an
 unjust and unhallowed transaction from the beginning.”

LORD ROSSLYN concurred.

It was ordered and adjudged that the interlocutors be
 and the same are hereby reversed, and that the de-
 fenders be assoilzied.

For Appellants, *J. Mitford, R. Dundas, John Clerk.*

For Respondents, *W. Grant, R. Hodshon Cay, W. Erskine.*

NOTE.—The first part of this case is reported Mor. 12,244, but
 the question of damages is not reported.

(M. 12827.)

SIR JAMES COLQUHOUN of Luss, Bart.,	<i>Appellant;</i>	1801. COLQUHOUN v. MAGISTRATES OF DUMBARTON, &c.
The PROVOST and MAGISTRATES of Dumbarton, His Grace the DUKE OF MONTROSE, PETER SPIERS of Culcroich, and Others,	<i>Respondents.</i>	

House of Lords, 18th June 1801.

SALMON FISHING—STENT NETS ILLEGAL—IMMEMORIAL USAGE.—

The appellant's lessees having, in the exercise of the right of fishing in the river Leven, resorted to a mode of fishing, by means of fixed stobs and nets placed at the mouth of the river, so closely together, and the nets so close in the meshes as to prevent the fish from getting up the river, to the injury of the rights of fishing of the upper heritors. And this mode of fishing being claimed in virtue of immemorial usage of such fishing: Held in the Court of Session, that as the appellant had produced no right to a cruive fishing, he was not entitled to exercise his right of fishing by these stent nets. In the House of Lords, the case was remitted for reconsideration, with doubts expressed, whether the statutes in regard to cruive fishings could apply to the mode here practised, and also, whether an immemorial usage of such fishing could be destroyed, by its merely bearing an analogy to cruive fishing.

The appellant's ancestor, Sir John Colquhoun of Luss, acquired by purchase from the Duke Lennox, certain lands in the county of Dumbarton called Baloch, "with the fishings of salmon, and other fishings, in the river of Leven and loch of Lochlomond," or Lochmouth.

The respondents, the town of Dumbarton, had a right of fishing salmon on the lower part of river Leven, at the mouth near to the sea.

The other respondents were superior heritors, having rights of fishing above that of the appellant.

When the appellant's ancestor fished his own salmon, this was done by fixing a row of stobs or stakes into the channel of the river, about eight or ten feet apart, and running in a curved line bending upwards across the river, in the middle of which an opening was left of twenty or thirty feet wide, through which boats passed. Their nets were put into the water at some distance above the stobs, and one net tied to another, till they extended as near the bank on each side as a boat could reach—the top of these nets being kept afloat, and the bottom sunk with slates.

1801. The fish got entangled by running against them, were caught by the gills, and were suspended there until, on the fisherman seeing the cork sink, rowed to the spot and secured the salmon, and, according to this fashion, it was alleged by the appellant that he had immemorial possession of the fishing.

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But, in 1760, the appellant's father let his fishing to an English company, who made considerable alterations in this mode of fishing. They brought down the row of stobs to the mouth of the river, and placed these stobs much closer. They fastened nets to them with strings at top and bottom. These nets were thicker in the twine, and closer in the mesh, so as not to serve the purpose of hanging and catching the fish by the gills, but of detaining them in the river below, until the fishermen caught them with their draught nets.

The result of this fishing was to injure that of the superior heritors, and, in particular, the inferior fishing immediately below, belonging to the town of Dumbarton. Various complaints arose, and litigation took place.

The town of Dumbarton raised at last a declarator against the appellant's father, afterwards transferred, on his death, against him, to have it found that he had no right to erect cruives upon the said water of Leven, nor to keep up unlawful engines at present employed by him in the said fishing, to the great hurt and prejudice of the respondents' salmon fishing, and hurt of the navigation of the river, and thus preventing the fish to get up the river, and that the defender (appellant) had only a right of salmon fishing by net and coble, in the usual and legal manner.

Dec. 4, 1789. In this process, the Court found that "the magistrates of the town of Dumbarton have a sufficient title to insist in this action; finds the defender has produced no right to a cruive fishing in the river Leven, nor to erect therein the engines complained of; and he is bound to remove the same, and decern."

The appellant, conceiving that this interlocutor did not affect his mode of fishing, as practised previous to the lease to the English company, brought a declarator to have his right declared against the magistrates, as well as against the superior heritors, viz. that "he has a right to fish the salmon in the same manner as was practised by his ancestors for time past memory, and that in virtue of his special grants of salmon fishing in the said loch and river, he has good

"right to exercise his salmon fishing in the said loch and river by all lawful ways and means, by net and coble, or by shooting rows of nets wholly across, and sinking the same to the bottom with weights, and floating them to the surface with cork; and to drive the rows of stobs or posts across the bed of the river, for preventing these nets from being carried down by the current, and to fix hanging or masking nets by the one end to the posts, for masking the fish."

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&c.

These two declarators were conjoined: and afterwards a proof was allowed and taken by both parties.

The question was argued as if it were one between the magistrates of Dumbarton and the appellant, leaving the appellant's case with the other respondents to be afterwards disposed of. It was maintained that the magistrates had no title to insist in this action, in so far as the mode of fishing by him in the upper part of the water, because they had no interest so to question his right and mode of fishing, they being lower heritors on the river, and not higher heritors, so that his mode of fishing could not, from the nature and habits of the fish, be detrimental to the right of the lower heritors. Before the salmon got to the appellant's fishing grounds, they must necessarily have come through and have got out of the fishing grounds belonging to the town of Dumbarton, and, consequently, the moment this took place, the interest of the town of Dumbarton ceased and determined, and they could catch no salmon but such as had already passed beyond the bounds belonging to the town. It was answered, that the magistrates' title to insist in this action relative to their fishing, was beyond all dispute. It was enough for the town of Dumbarton to aver and show, that their fishing, at one time good, was, since the erection of the engines in question, entirely destroyed, and though it might seem at first sight very plausible in theory, that the barrier or structure erected by the appellant in a higher part of the river, could not prevent the fish from coming to the fishing grounds belonging to the town of Dumbarton, yet the fact was indisputable, and could be proved, that such structure had diminished the fishing to less than a fourth of what it was; and this was the general tendency of cruive fishing. Besides, it was hurtful to the fishing otherwise, because, as salmon are led by natural instinct into these rivers to spawn, if engines are so erected as to prevent a single salmon from getting up to deposit its spawn, the

1801. river, in the course of time, would become entirely barren
 The appellant further maintained, in reply to what was
 COLQUHOUN said as to these structures hurting the right of navigation
 v. that if he had such a right, then it could not be affected by
 MAGISTRATES the allegation that it may prove hurtful to the navigation of
 OF the river.
 DUMBARTON,
 &c.
 Dec. 21, 1793, The Lords, of this date, pronounced this interlocutor:—
 and Jan. 16, “ In respect the title of magistrates and town council of
 1794. “ Dumbarton to insist in the present action against Sir
 “ James Colquhoun has been already sustained, find it un-
 “ necessary in *hoc statu* to determine upon the titles of the
 “ other pursuers: find that Sir James Colquhoun, having
 “ produced no right to a cruive fishing, he is not entitled to
 “ exercise his right of fishing by stobs and nets, as claimed
 “ by him previous to the year 1760, nor to interrupt the
 “ navigation either in the river, or in the mouth of Loch
 “ Lomond, and in so far decern and declare in the action at
 “ the instance of the town of Dumbarton. And in the ac-
 “ tion of declarator at the instance of Sir James Colquhoun
 “ assoilzie the magistrates and town council of Dumbarton
 “ from the whole conclusions thereof, and decern; but rem-
 “ to Lord Craig to hear the other parts thereon.”*

* Opinions of the Judges.

LORD PRESIDENT CAMPBELL said,—“ This is a question, whether
 stent nets across a river are lawful.

“ In three instances, at least, they have been found unlawful.
 The first is Fountainhall, 10th Feb. 1693, Fishers on Don. This
 decision has escaped the counsel, as it happened not to be reported
 in the Dictionary; but it concludes with these words:—‘ And the
 ‘ Lords further discharged either party to make use of a stent net
 ‘ as that which had been the *origio mali*, and bone of contention be-
 ‘ tween them.’

“ The second case is the Duke of Queensberry against the Magis-
 Mor. 14, 279. trates of Annandale in 1771, Nov. 19. In it the Court found:—A
 to salmon fishing in the river of Annan, ‘ Find that although the Mar-
 ‘ quis, the inferior heritor, and his tenants, have right to use all legal
 ‘ engines and methods for catching the fish conform to law, and to
 ‘ their possession; yet they have no right, either in time of actual
 ‘ fishing, or in any other time, to erect any engine, or use any method,
 ‘ thod, not for the purpose of catching the fish, but for preventing or
 ‘ obstructing them from passing up the river; and therefore find that
 ‘ the method used by them of stenting nets across the river is
 ‘ illegal.’

“ The third case was the former judgment in this very case, 4th

Against these interlocutors the present appeal was brought. 1801.

Pleaded by the Appellant.—The town of Dumbarton has no interest either to insist in a process for limiting the appellant's right of fishing, or to oppose the conclusions of the summons; because the salmon fishing belonging to the town of Dumbarton, in the lower part of the river, never can be affected by any mode of fishing which the appellant may follow in the upper part, as it is an undisputed fact, COLQUHOUN
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Dec. 1789, where two points were decided, first, that Sir James had no right to cruives; 2dly, That he had no right to use the engine in question, which was no other than a stented net across the bottom of the loch, according to an improved plan, and somewhat more destructive than formerly.

"Another point was decided, viz. that the pursuers had a title to complain, and their title is the same now.

"The great object of these bulwarks, whether of stone or network, is to prevent the passage of the fish upwards, and to keep them in a pool below, where they are easily caught, either by net and coble, by stell nets, or other methods. The new mode was by a stell of a particular construction. The old was by hang nets,—masking nets,—trap nets, &c.

"A salmon, when stopped by a dyke, endeavours to make over it, but, when stopped by a net, seldom attempts this. Some of them may try to get through, and are caught in the meshes, but, in general, they keep below.

"The stobs are not placed at the mouth of the river, but within the loch, in order to make a pool below."

LORD JUSTICE CLERK (M'Queen).—"Leven is a public river. The alveus as well as the river, is *juris publici*. No party, whether king or individual, is entitled to shut up a public river by any bulwark whatever. No doubt there is an exception of cruive fishing granted by the crown, but these are subject to regulations. I think stented nets across a river are illegal."

LORD ABERCROMBY.—"Of the same opinion."

LORD METHVEN.—"Of the same opinion."

LORD DUNSINNAN.—"Of the same opinion."

LORD MONBODDO.—"Of the contrary opinion. This is an inferior mode."

LORD SWINTON.—"The case is precisely the same as was decided at the Sessions in Carlisle, two years ago, between Lord Lauderdale and others. The engine was found to be illegal, and held to be a nuisance."

President Campbell's Session Papers, Vol. 71.

1801. that the fishing is confined to salmon going up the river
 COLQUHOUN v. from the sea, and that the fish which are going down the
 MAGISTRATES river, after having spawned, are never killed, so that no fish
 OF are taken at the appellant's fishing but such as have already
 DUMBARTON, escaped the bounds of the fishing belonging to the town of
 &c. Dumbarton. The appellant and his authors have from time
 immemorial been in possession of a salmon fishing at the
 loch mouth, by means of stobs and set nets, in the manner
 before described; and although certain alterations in this
 mode of fishing were introduced when the fishings were let to
 the English company and were challenged, yet the old mode
 of fishing by stobs and set nets, which had been so practised
 for time immemorial before the year 1760, was never in-
 terrupted or challenged by any party having interest, but,
 on the contrary, was acquiesced in by the respondents.
 And, having so fished, he has acquired an undoubted right
 to continue that mode of fishing in all time coming, and the
 possession which has thus followed must be held to be ex-
 planatory of the grants contained in the appellant's and his
 authors' titles. This being established, the mere allegation
 that this may impede the navigation of the river, cannot
 affect his right.

Pleaded for the Respondents.—There is no occasion to
 dispute the title of the magistrates of Dumbarton to raise
 this declarator in regard to their fishing, as that is beyond
 all dispute. The question of title in the other respondents,
 is not now in issue, that being reserved. The real question
 is, has the appellant a grant of cruive fishing in the river in
 question? His title confers only a right of salmon fishing
 in general terms. The possession had by him, whether
 prior or subsequent to 1760, cannot raise that title into a
 right of cruive fishing, and even if he had a right of cruive
 fishing in express terms, the mode of fishing resorted to by
 him prior and subsequent to 1760, would not have been
 warranted by such a right. The fishing by cruives and yairs
 has been regulated by acts of parliament, which were fram-
 ed because fishing by cruives was more destructive; and al-
 though nothing was mentioned about the modes practised
 by the appellant, yet as the principle which dictated these
 enactments is the same, namely, the destruction of the fish
 by fixed machinery and such like devices, the acts must
 be held to apply to all such apparatus for catching salmon.
 These acts were intended to restrain the method of fishing
 by cruives, and it is not to be supposed that a more destruc-

tive mode of fishing, of a similar nature, was to be allowed and practised, devised probably to evade the acts. The appellant cannot defend the mode of fishing practised subsequent to 1760; he now confines the argument to the trade practised by him prior thereto; but this practice to which he refers, and on which he founds a prescriptive right of possession, being by fixed machinery, is equally objectionable, and equally illegal; and if his mode of fishing be contrary to law, then no length of time of use and possession can justify or give a right of fishing, by erecting wooden posts or stobs across the mouth of a river, for the purpose of enhancing the value of his own fishing, contrary to law. The interest of the town of Dumbarton, although lower in the river than the appellant, is undoubted. It is enough that the town show, by the machinery in question, their fishings have been hurt—that the salmon will be prevented from getting up to spawn—and that the mode practised is illegal in itself.

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After hearing counsel,

THE LORD CHANCELLOR ELDON said,—

“MY LORDS,

“The present appeal is brought from two interlocutors of the Court of Session, one as far back as the 4th December 1789, and the other of 21st December 1793.

“To make the proceedings in the cause intelligible to your Lordships, I must mention, that the appellant, Sir James Colquhoun, and his predecessors, were in possession of a salmon fishing, of some species or other, in the river Leven, which they had acquired from the ancient family of Lennox. It was stated, that of this fishing they had had undisturbed possession from time immemorial, and the mode contended for was by fixing stobs in the river and putting nets into the stream, so that they should fasten on these stobs, the nets being supported with cork at the top, and at the bottom sunk with stones. It was stated, that from time out of memory the fishing had received no interruption down to 1760.

“At this period, the fishings are let to an English Company, who altered the mode formerly practised, rendering it much more productive. The superior heritors then complained, (and naturally enough if they had rights of salmon fishing,) that the fish were much diminished in their part of the river, and insisted that they had a right to abate the new erections. In the correspondence between the parties upon this subject, before any action was commenced, they do not seem to have complained of what the appellant calls his ancient and immemorial mode of fishing, but of this alteration in 1760.

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"The town of Dumbarton, too, who had a fishing of salmon lower down the river, also complained that they were prejudiced by these new erections; they stated, that by them their fishings were diminished three-fourths in value. They did not make out clearly how this prejudice arose, but alleged that the salmon which had been spawned in the river continued to retain a great attachment to it and naturally returned thither from the sea to deposit their spawn but that, if the appellant's new erections were suffered to remain, no fish would be left which had that attachment to the river.

"The superior heritors, in 1786, brought an action of declarator concluding in their summons that Sir James Colquhoun had neither a right to cruive nor to keep up "the unlawful engines at present employed by him," which they considered to be different from cruives. (Here the conclusions of the summons were read.)

"The appellant contended, that these pursuers not having rights of salmon fishing, had no title or interest to insist in the action. It seems to be undisputed, that this was not the species of action suited to do away any interruptions to the public right of navigation.

"It is stated, that to help out their case, the superior heritors prevailed upon the town of Dumbarton to bring another action. There is no proof of this; but, in point of fact, this action was commenced, in which the conclusions were nearly the same as in the former action.

"The appellant contended, also, that the town had no title or interest to insist in the action, and that his stented nets could be of no prejudice to them. I do not hesitate to say, that I think it will be difficult to show that the town of Dumbarton had an interest to object to the fishing as practised before 1760, if they have nothing to urge on their part but the philosophical argument already alluded to; for if weight is to be given to this argument, long before 1760 not a fish would have been left in the river.

"These processes came on to be heard in July 1787, and condescendences were ordered to be given in, both for the superior heritors and for the town of Dumbarton. To this period, the only question between the parties was, as to the right of keeping up the erections of 1760. And it does not follow, that if the town of Dumbarton could make out an interest against that mode of fishing, that they could also against the old mode.

"On the 3d July 1787, the Lord Ordinary pronounced an interlocutor in favour of the appellant. (This interlocutor read by his Lordship).

"This argument proceeds on a matter of fact, and a principle of law drawn from it, that the defender, having made out a right to cruive-fishing, was entitled to exercise this mode of fishing which had been erected. It is not now urged that the appellant has a right to a cruive-fishing in point of fact, and I have not heard from the arguments at the bar sufficient to satisfy me, that a right to cruives would give also a right to this species of fishing.

"The two processes were then conjoined, and the Lord Ordinary, on the 4th December 1789, pronounced the first interlocutor appealed from.—(This interlocutor read by his Lordship.)—This does not contain so direct a proposition as the former interlocutor; but it is difficult to say why it should say one word of cruives. It must be considered as stating negatively on this point what the prior interlocutor had stated affirmatively.

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"The appellant then argued, that if he should be found to have no right to keep up the erections of 1760, still he had a right to say, that showing an immemorial possession of a certain species of fishing before that period, his ancient fishings should not be cut up root and branch. The pursuer answered, that the Court had no right to decide upon that, the actions being only to do away the encroachments in 1760; and the Court seem to have been of the same opinion.

"The pursuers, however, went of their own accord, and destroyed every species of obstruction on the river. And the appellant then commenced his action of declarator to establish his right to the old mode of fishing.—(His Lordship read the conclusion of the appellant's summons.)—The declarator was conjoined with the two former actions.

"The operation of this, I conceive, was to bring distinctly before the Court the following questions:—Whether the superior heritors had a title or not to insist in their action against the appellant? Whether or not the town of Dumbarton had an interest to insist against the erections of 1760? And, also, against the former mode as it had been practised? If the erections of 1760 were illegal, whether or not the mode prior to 1760 was also illegal? If the appellant could make out an immemorial usage of it? And, also, the great and important question, Whether or not this right depended upon a right of cruive-fishing, and if the appellant had no right to cruives, he could not be allowed the mode he contended for.

"On the 21st December 1793, the Court pronounced the second interlocutor appealed from.—(Read by his Lordship.) The depositions of the witnesses here mentioned were taken in the former actions of declarator, not in that at the appellant's instance. It mentions that the title of the town of Dumbarton "has been already sustained." But I entertain great doubts if it had been sustained, as to all the purposes of the conjoined process; it is true, it had been sustained as against the erections of 1760; but as to the prior mode, their interest appears to me so thin that I have difficulty in perceiving it. Your Lordships will see also, that it is distinctly stated to be the law of Scotland, that nothing but a right to cruives could support this mode of fishing.

"The effect of this interlocutor seems to be, that the Court of Session were satisfied that the interest of the town of Dumbarton had been duly sustained; that there was no right to cruives, and

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even though the appellant's engines had existed from time immemorial, they were therefore to be destroyed; and that, in these circumstances, it was not necessary to enquire into the title or interest of the superior heritors.

"On this doctrine, with regard to cruives, I own I wish to have farther satisfaction. It has not been made out clearly to my mind from statutes, from writers of authority, from decided cases, or from arguments in this cause. I could therefore wish the matter to be again fully considered on this point.

"Upon the merits of this question, it would be unfit at present to say much. But if it appears that the mode of fishing contended for has been exercised from time immemorial, it ought not to be decided away but on strong grounds; and it appears difficult to say that it has not been exercised from what, in this country, is deemed time immemorial, much more what is so deemed in Scotland. A broad species of fishing appears from ancient deeds; it is proved by leases which from there being a rent stipulated, a *quid pro quo*, and a very strong species of proof. It is proved also by the testimony of living witnesses, with such difference only in their statements as tends to confirm the general truth of what they swear to. What signifies upon this point, if the stobs existed, whether they were a little nearer or more apart from one another?

"I own it is a very serious question with me, if this fishing of the appellant's has obtained in all time past, whether or not it shall be destroyed from analogy drawn from cruive-fishings? It is difficult to say, that the statutes can be applied to this mode of fishing. The decided cases, where there had been no immemorial possession, do not apply here. A net could not be set up in a river at the present day; but, from the immemorial possession, we are drawn necessarily to presume that the fishing must have been founded at first in a grant long since perhaps reduced to dust and ashes.

"This cause is not single and alone; other very valuable fishing have been attacked on the same grounds. This renders it more necessary to be duly considered. I conceive also this cause should be remitted back to the Court of Session to review the interest of the town of Dumbarton, and the title and interest of the superior heritors; for if the Court should be of opinion that the town of Dumbarton had an interest to object to the mode of fishing before 1760 and if your Lordships should afterwards be of opinion that they have none, it would be a pity were the cause to come here again, at these points not well considered. I conceive that the cause also should be fully considered, as well with reference to cruive-fishing, as when taken by itself without reference to them. I shall, between this and to-morrow, draw out the sketch of a judgment such as I conceive fit to be submitted to your Lordships.

"I have the satisfaction to know, that my opinion with regard to this cause, concurs with that of a noble and learned Lord now at the bar.

Lord Thurlow.

sent, for whom I so justly entertain the highest respect. It coincides also with that of a noble and learned person now near me, (Lord Rosslyn*) to whom I am much indebted for his assistance in enabling me to discharge the duty that I owe to my country."

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It was ordered and adjudged that the case be remitted back to the Court of Session in Scotland, to review the interlocutors complained of with respect to the interest of the town of Dumbarton to insist in the present action, and to proceed at the same time to consider and pronounce upon the title and interest of the superior heritors, and also generally to review that part of the several interlocutors which relates to the right of fishing claimed by Sir James Colquhoun, and more especially, as far as these interlocutors connect the right of fishing, as claimed by him, with his having or not having, a right of cruive fishing.†

For the Appellant, *Ro. Dundas, W. Grant, William Robertson.*

For the Respondents, *W. Adam, J. Campbell.*

[M. 15539.]

MRS. ANN BRUCE of Arnot, and THOMAS BRUCE, Esq., her Husband,	} <i>Appellants ;</i>
JAMES BRUCE of Tillycoultry, and CHARLES SELKIRG, Accountant in Edinburgh,	
	} <i>Respondents.</i>

House of Lords, 18th June 1801.

ENTAIL—DEFECTIVE RESOLUTIVE CLAUSE.—The entail of Tillycoultry contained prohibitions against selling the estate, or contracting debt, or breaking or innovating the tailzie in any way. This was followed by an irritant clause, declaring that *all which deeds* shall be null and void. Then followed this resolute clause declaring that the said heirs of tailzie who might "contravene the said

* Lord Loughborough, on resigning the seals, was elevated in the peerage by the title of Earl of Rosslyn.

† Under this remit the Court of Session found, (6th July 1804, Mor 14284,) that the town of Dumbarton had an interest to insist in the action ; and also sustained the title of the other heritors. They also found, that the mode of fishing by means of stented nets and stobs, stretching across the mouth of the river, adopted by the appellant, was illegal.

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" clauses irritant, or any of them, adding a special enumeration these, without enumerating sales : Held that the resolute clause in this entail was not sufficient to protect against the sale of estate. Affirmed in the House of Lords.

The question in this case was, whether, under the entail of the estate of Tillicoultry, the estate was sufficiently protected against sales, by the prohibitive, irritant, and resolute clauses therein.

The family estate of Kinross, being encumbered by debt, was sold by act of parliament, and the balance of the price after paying the debts, ordered to be laid out in the purchase of other lands, to be vested in the same series of heirs, and under the same prohibitions and irritant and resolute clauses as were contained in the entail of the estate of Kinross (1683). With the balance of the price the estate of Tillicoultry was purchased : and the disposition or deed of tailzie contained precisely the same prohibitory, irritant and resolute clauses, as were contained in the entail of Kinross. These were as follow : Prohibiting the heirs of tailzie " or any of them, to sell, annailzie, dispone, dilapidate, put away the aforesaid lands and estate, nor any part or portion thereof, nor to break, innovate, nor infringe the present tailzie, nor contract or undertake debts, nor to do any other fact nor deed, civil or criminal, whereby the said lands and estate may be anywise apprised, adjudged, evicted, or forfeited from them, or anywise affected to the prejudice and defraud of the subsequent heirs of tailzie above mentioned, successive according to the order and substitution above written ; neither shall it be lawful for any person or persons to be lawfully or lawfully to the said James Bruce, or the other heirs of tailzie and provision foresaid, to suffer and permit the said lands and estate, or any part thereof, to be evicted, sold, judged, apprised, or any otherwise evicted, for any debt or debts contracted or done by them." Then follows the

Irritant clause. irritant clause, "*all which deeds shall not only be declared void and null ipso facto by way of exception or repudiation, without declaration, or in so far as the same may burden and affect the foresaid estate ; but also it is hereby provided and declared, that the said James Bruce, and the other heirs of tailzie who shall contravene, and incur the said clauses irritant, or any of them, either by not assuming the name and arms of Bruce, &c., or who shall break or infringe the said tailzie, or contract debts, or commit any other fact or deed, whereby the said tailzied lands :*

Resolute clause.

"estate may be anywise evicted or affected in manner fore-
 "said, or who shall suffer and permit the said lands and
 "estate, or any part thereof, to be evicted, adjudged, or
 "apprised, or anywise affected for the debts or deeds con-
 "tracted or done by them before their succession, or by any
 "of their predecessors, whom they shall represent, that
 "then, and in any of the said cases, the person or persons
 "so contravening as said is, shall forefault, amit, and tyne
 "their right of succession of the aforesaid lands and estate,
 "and all infestment or pretended rights thereof in their
 "persons shall, from thenceforth, become extinct, void, and
 "null *ipso facto*."

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The respondent, James Bruce, succeeded to the estate, as heir of entail, and was infest in 1796, under the provisions and conditions, and irritant and resolute clauses contained in the entail; but thereafter, finding himself embarrassed, he sold part of the estate of Tillycoultry, conceiving that he had power to do so, because the resolute clause in the entail did not protect against sales. The purchaser brought a suspension of a charge for the price; and the respondent, on his part, brought a declarator, the conclusions of which sought it to be declared that he "had undoubted right to make the said sale, and to execute the foresaid dispositions, and that he was not prevented from so doing by the foresaid deed of entail, or by any of the titles upon which he possesses the foresaid lands; and that the said disposition executed by him, with consent foresaid, is an effectual disposition to all intents and purposes."

In the debate, he further maintained that the limitations of the entail were not to be extended by implication or construction, beyond the plain meaning of the words; and that though an entail contained the strongest prohibitory clauses against selling or contracting debts, with irritancies of all acts of contravention, yet that those prohibitions and irritancies would have no effect against the purchasers for valuable considerations, or *bona fide* creditors, unless they were accompanied with apt and corresponding resolute clauses, directed expressly against sales—that such was not the case here, and that the terms, "*all such deeds*" or "*acts*," could not be construed to mean sales. It was answered, that the deed of entail in question, contained such prohibitory, irritant, and resolute clauses as the statute required. The resolute clause was, *de facto*, conceived in terms and words sufficiently accurate and effectual to resolve and an-

1801. nul the right of the heir in possession who might attempt to sell; and this being the case, and the act of parliament no having prescribed any particular form of words in which these clauses were to be expressed; all that was necessary was, that these be intelligible, and apply to all the acts prohibited. In this case, the terms "all which deeds" and "acts and deeds," used in the resolute and irritant clauses were sufficiently broad to comprehend and fence the prohibition against sales.

June 26, 1798. Upon the report of Lord Craig, the Court pronounced this interlocutor, "sustains the defences, assoilzies the defenders, and decern."

Jan. 14, 1799. On reclaiming petition, the Court pronounced this interlocutor: "The Lords having advised the petition, and additional petition, with the answers thereto, in respect the resolute clause in the entail does not apply to a sale of the estate, alter the interlocutor reclaimed against, and find the disposition libelled on valid and effectual to the purchaser, and find the letters orderly proceeded, and decern and declare accordingly."

Against this interlocutor the present appeal was brought.—*Pleaded for the Appellants.*—The act of Parliament, which requires that entails should contain clauses, *prohibitory, irritant, and resolute*, prescribes no certain form of words which the resolute clause should be conceived. All that is necessary is, that the resolute clause be so expressed that, upon a rational construction of it, its obvious meaning may be found to apply to the prohibition against sales. In the entail in question, the prohibitory clause minutely specifies various acts which are prohibited, namely, selling, alienating, disposing, dilapidating, or putting away the foresaid lands and estates, or any part or portion thereof. The irritant clause, conceived in general terms, is admitted by the respondent to refer to every act of contravention prohibited by the preceding prohibitory clause. The subsequent resolute clause "provides and declares that the said James Bruce, and the other heirs of tailzie who shall contravene and incur the said clauses irritant, or any of them that then, and in any of the said cases, the person or persons so contravening, as said is, shall forfeit, amit, or tye the right of succession of the foresaid lands, and all infeftments, or pretended rights thereof, in their persons shall from henceforth become extinct, void and null, *ipso facto*." The reference in this resolute clause to the ir-

irritant clause, couples it with the clause prohibitive, and makes the whole complete. That the entailor has, from an over anxiety, encumbered this resolute clause with the enumeration of some of the prohibited clauses is undoubted; but this was unnecessary, and must be viewed as mere redundancy, and ought to be held as *pro non scriptis*; for, without these words, the entailor's intention is clear and explicit, that the right of the heir of entail should be resolved, and cease and determine, on his contravening any of the matters specified in the prohibitory clause.

Pleaded for the Respondents.—The limitations of an entail are not to be extended by reference or implication beyond what is expressed in the entail itself. This being the rule of law applicable to the construction of such deeds, it follows that this principle must operate, whether the question be one with the heir, or, as in this case, one with third parties. Where, therefore, there are limitations or prohibitions against selling and contracting debt, in order to make these effectual against creditors or purchasers, it is necessary that there be a resolute clause expressly mentioning sales, and contracting debt, as a voidance of the right of the heir so selling or contracting debt; and unless the irritant and resolute clauses bear a special reference to sales and contracting of debt, as mentioned in the prohibitory clause, the entail will not, in terms of act 1685, protect the estate from either the one or the other. In the present case, there is no sufficient resolute or irritant clause, which points against sales; and no terms which, by force of construction, can be held to apply to such. And, as all entails must be strictly interpreted, and no restriction is to be imposed by implication, and as apt irritant and resolute clauses have not been used in terms of the statute, the estate is not protected against sales.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,—

“ MY LORDS,

“ Though it may be unnecessary to trouble you with my observations in this case, as, in my opinion, the judgment ought to be affirmed, I deem it expedient, however, to state the grounds which weigh with my mind, in proposing the judgment which I mean to offer to the House.

“ The single question which has been agitated, arises upon the effect of the prohibitive, irritant, and resolute clauses of an entail, and whether *these* prevented the estate from being disposed of? In fact,

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the estate has been sold ; but it was the purpose of the action establish the validity of the sale.—(Here his Lordship read the prohibitory, irritant, and resolute clauses of the entail.)—The prohibitive clause is here undoubtedly broad enough. No argument has been raised on the irritant clause. The whole rests upon the resolute clause. I must say, that under such a settlement, containing such clauses, no person, other than a Scotch lawyer, could have an idea that the estate was not sufficiently tied up from a sale. The parties interested were certainly of this opinion themselves at one period, when they applied to the Legislature for an act of Parliament relative to this entailed estate.

“ It is now contended, from the authority of reported cases, that selling the estate is not a breach of the resolute clause. It is true said, that a prohibitive clause by itself will not do ; that an irritant clause will not do ; and that, if the resolute clause be not broad enough, we cannot go to the intent and meaning of the parties.

“ What reason induced the Court to go so far as they have do in those decided cases, I am at a loss to know. The whole class of cases which I allude to, appear to me to be founded in some political notions of the judges, that the law of the land was of a mischievous tendency, and that, by their judicial proceedings, they ought to make what they deemed the bad policy of the law.

“ I own, that the judgments given in the cases of Duntreath, and other cases relative to entails, appear to me to shock every principle of common sense. In this country also, a mode was devised by the judges, of getting rid of entails by petitions, recoveries, &c. It would have been more principled and wholesome, if the judges in both countries had applied to the Legislature, when they deemed the law required amendment, than thus to have repealed it by judgments in Court. It is too late now to enter into those cases ; the security of landed property must necessarily lead your Lordships to act on the principles recognised by the Courts, and repeatedly adjudged in your Lordships’ House.

“ The question at present before your Lordships distinctly comes to this point ; Is this entail so conceived, that the right of the heir shall immediately resolve on his selling the estate ? Looking at the deed, no person can say that he does not, in his conscience, believe that a sale was intended to be excluded in the resolute clause ; but the purpose has been rendered of no effect, by cramming the clause with a long string of unnecessary words, and entering into a detail where every thing meant was not specially mentioned.

“ If the resolute clause had stopped in its enumeration, after the words, “ Contravene and incur the said clauses, irritant, or any of them,” there would have been no doubt in the present case. But it goes on to specify, by doing any of the following acts, relative to the name, arms, marrying certain persons, or not accepting the benef

of the entail; it then changes the phrase, or "who shall break or innovate," &c.; or do any act or deed by which the estate may be evicted or affected, &c.

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&c.

"It may seem odd to make it a question, Whether selling an estate be an act by which it is evicted or affected; yet, in terms of the decided cases, which I have alluded to, and even according to the grammatical construction of the present instrument, the question must be answered in the negative. The prohibitive clause here treats the words, *breaking* the entail, and affecting the estates as different and distinct from selling and disposing it. When these words, break and affect, occur again in the resolute clause, we must take them in the same way as in the prohibitive clause.

"But the matter does not rest here. According to the decided cases, you cannot express or include a sale by these words. We are therefore reduced to this, that while we have a full conviction in our mind, that the granter of the deed meant to prevent a sale, yet we cannot act upon this; because the Court of Session has, with your consent, perhaps with your Lordships' directions, decided many cases another way. And the security of real estates in Scotland would be cut down, if you were now to refuse to adopt the doctrine, that a resolute clause is not good on such general words.

"Therefore, when I move your Lordships to affirm the interlocutors complained of, I shall give my vote as *not content*, protesting that, as a judge, I never could have concurred in the former decisions originally when they were pronounced.

It was accordingly

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *R. Dundas, W. Grant.*

For Respondents, *W. Adam, John Clerk, Wm. Clark.*

COLIN MACDONALD of Boisdale,	.	.	.	<i>Appellant;</i>
RANALD GEORGE MACDONALD of Clanranald,	}			<i>Respondents.</i>
Esq., and his Tutors and Curators, and his				
Tenant in Kilphedar,				

House of Lords, 22d June 1801.

SERVITUDE OF SEA-WARE—IMMEMORIAL USAGE—PRESCRIPTIVE TITLE.—An action of declarator having been raised, to have it found that the appellant had acquired a servitude of taking sea-ware from a neighbouring farm, the lands of which extended to the sea shore, on which the sea-ware was cast, and being claimed

1801. not as a contiguous proprietor, but as a tenant of the farm in
to exercise this right.—Held, that the appellant had no title
MACDONALD prescribe a right of servitude, and that the lands from which
v. sea-ware was taken, were not liable to the servitude claimed.
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&c.

1730. The farms of Kilphedar and Boisdale, situated in the island of South Uist, belonged in property to the respondent's grandfather, and were both let in lease by him to the appellant's father. The lease was to endure for fifty-eight years. The farms were situated along the sea-shore, and from their situation, sea-ware, upon which they relied as the only manure for the land, was cast on shore in great abundance. As the tenants in the farm of Boisdale had been previously in the practice and use of taking sea-ware from the shores of Kilphedar, so the appellant's father continued to exercise this right of taking sea-ware when he became lessee of both farms. It was alleged also, that the practice throughout the island was, that as the sea-ware was cast on the shore in greater abundance than was requisite for any one farm; that all the adjoining tenants and feudatories were in use to come and take a part away. Under the present lease, accordingly, the appellant's father had been in use in carting away the sea-ware found on Kilphedar farm to Boisdale farm.

1758. In the year 1758, and while there were many years of the lease to run, the respondent's father sold the farm of Boisdale to the appellant's father, "with the hail parts, pendicles, and pertinents of the lands, so restricted, as they are presently set, and such other farms as may happen to be erected upon the aforesaid bounds, together with the fishing, rock, sea-ware cast and growing upon the said lands disposed, with liberty of manufacturing the same into kelp as the same are possessed by Alexander Macdonald and his sub-tenants."

From the date of this charter, the appellant's father possessed the farm of North Boisdale as proprietor, and that of Kilphedar as tenant, and he continued, as formerly, the practice of taking sea-ware to manure the lands of North Boisdale from the shores of Kilphedar, till his death in 1768; and his son, the appellant, continued the same practice until the expiry of the lease of Kilphedar in 1788; and for three years thereafter, when the farm having been let to another tenant a suspension and interdict was brought by the respondents to have the appellant prohibited from taking the sea-ware from the lands of Kilphedar, as he had been in use to do

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while he held these lands in lease under him. The bill was passed to try the question. Whereupon the appellant brought a declarator, to have it declared, that the tenants and inhabitants of the lands of North Boisdale, belonging to the pursuer, had been in the immemorial practice of exercising the right of "servitude, of gathering and collecting "for manure to their possessions, the sea-weed and wreck "cast on shore on the lands of Kilphedar and others, belonging to Clanranald, and of using and away carrying "the same at pleasure, and that the pursuer and his successors have a right to exercise the said servitude in time to come, according to use and wont." A counter summons of declarator was raised by the respondents, of immunity from such servitude. These actions being conjoined, the appellant maintained that the custom of the tenants on the farm previous to the lease had been to take sea-ware from Kilphedar to manure Boisdale farm, and that, in pursuance of that custom, he had exercised such right from the date of his lease 1730 till the time he purchased these lands in 1758. And, at this period, they were conveyed to him in property, "*as the same are possessed by the said Alexander Macdonald and his sub-tenants.*" Of same date, he got a lease of the lands of Kilphedar, with the sea-ware, and part and pertinents, as the same are possessed as above. And the right thus confirmed continued to be possessed from the date of the charter downwards without interruption to the year 1791, which was sufficient to give him a right of servitude. In answer to this, it was maintained that no farm could claim sea-ware from the shores of another farm, without claiming also the arable lands contiguous to such shores; because the sea-ware was always attached to the lands on the bounds of which it was cast. Prior to the sale of Boisdale, it was in the respondent's grandfather's power, when both farms belonged to him, to regulate them in any way, but when these came to belong to different proprietors, each was limited to the extent and nature of his own right. That the appellant had no right or title to the sea-ware on the respondent's farm of Kilphedar, nor had he acquired any servitude of such; and his possession could only be attributable to the lease, or at most to mere sufferance. That possession under the lease could not constitute a servitude, because that would be to make a proprietor prescribe a servitude against himself.

The immemorial custom and use in taking such sea-ware,

1801. the Lord Ordinary would not even allow to be proved, in order to constitute such a servitude, and therefore pronounced this interlocutor:—"Having particularly considered the clause in the feu-right respecting sea-ware in the declarator of servitude, at the instance of Boisdale against Clanranald, assoilzies the defender, and decerns; and in that of immunity at the instance of Clanranald against Boisdale, decerns in terms of the libel, except as to expenses; and in the suspension, alters the interlocutor re-presented against, which recalled the interdict, and continues it *in futurum*, and finds no expenses of process due to either party."

Nov. 22, 1796. Two several representations were presented against the
Dec. 6, 1796. interlocutor, and ultimately a reclaiming petition to the
Jan. 17, 1797. Court, but it was adhered to.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded by the Appellant.—The custom on which the right in question is founded, is prevalent throughout the island of South Uist, as well as in other parts of Scotland, and the appellant ought to have been allowed a proof of it, and of the other facts which he averred and offered to prove; because, if established, it followed that the servitude in question was constituted by the feu-charter granted by the respondent's grandfather in the year 1758.

Pleaded by the Respondents.—Whatever may have been the rights of the appellant's father under the lease of Kilphedar and Boisdale, to take sea-ware from the former, to manure the lands of the latter, yet when this lease terminated by a purchase of Boisdale by the lessee, or whenever the lease of Kilphedar terminated, it did not follow that the same right of collecting sea-ware on the lands of Kilphedar, for the use of the lands of Boisdale, was to be continued. There may have been a usage and practice of so doing under the lease; but such usage could not establish a servitude. The title was precarious, and the possession had been by mere sufferance only. Then, with reference to the right under the feu charter 1758, the appellant's father, and his heirs male, had right to the lands of Boisdale, "with the rock and sea ware cast and growing upon the lands disposed, with liberty of manufacturing the same into kelp." This title, therefore, only gives right to collect sea-ware on the "lands disposed," that is, on Boisdale farm; but it does not convey any right of servitude of collecting sea-ware

on the lands of Kilphedar. And the lease of same date, of the latter farm, corroborates this view, because it gives the lands of Kilphedar with "right to the sea-ware growing upon the shore of the said lands, or thrown in upon the same, with full liberty of manufacturing the same into kelp." Had any right of servitude of collecting sea-ware on Kilphedar been conveyed in this charter, it would have at once appeared, either from the charter itself, or from the lease of even date with it; but, so far from that being the case, that lease expressly conveys the whole sea-ware of Kilphedar as a part and pertinent of the farm, so that this latter lease supersedes all doubts on the subject. Having, therefore, no right conveyed to him, and the possession had been solely attributable to the lease, no right of servitude can attach. The possession of the lease of Kilphedar was, in the contemplation of law, the possession of the lessor; and the question must be viewed as if the respondent and his predecessors had, *in propria persona*, enjoyed the whole rights and privileges mentioned in the lease, and particularly the sole privilege of using ware for kelp, manure, or otherwise. If the possession had been upon the charter from the beginning, this, with forty years' possession of collecting sea-ware on another's lands, might have constituted a servitude, but that is not the nature of the appellant's right or title. Here there is no *termini habiles* for prescription; the only title upon which a claim of property could rest, is the feu-right in 1758; and the present dispute having originated in the year 1791, it is clear that the essential requisite of such a title is wanting, namely, forty years' uninterrupted possession.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *J. Mitford, James Mackintosh.*

For Respondents, *R. Dundas, W. Grant, W. Adam.*

NOTE — Unreported in the Court of Session.

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MENZIES, &c. v. BERESFORD, &c.	STEWART MENZIES of Culdares, an Infant, by the Honourable HENRY ERSKINE, and Others, his Guardians,	}	Appellants;
	MRS. ELIZABETH MACKENZIE BERESFORD, formerly Menzies, and her Husband, for his interest,	}	Respondents.

House of Lords, 30th June 1801.

ENTAIL—FETTERS—INSTITUTE OR HEIR OF TAILZIE.—The question in this case was, Whether James Menzies was an heir of entail and so included under the fetters of his great grandfather's entail directed against the heirs of tailzie; or to be considered an institute, and free from the fetters thereof. The Court of Session held that James Menzies was not an heir of entail under the deed 1697, but a donee, and, consequently, had powers to make supplementary entail of the estate. In the House of Lords, the case was remitted to review the interlocutors, so far as complained of, and to consider, Whether James Menzies, being expressly nominated and appointed an heir of tailzie by the first part of the deed 1697, although made a donee or institute by the latter part thereof, was not comprehended in the prohibitory, irritant, and resolute clauses.

The following deed of nomination of heirs of entail was executed by Colonel Menzies of Culdares in 1697, with special reference to, and in exercise of the powers reserved in a previous entail (1675). In the first part of the deed there was a nomination of the heirs of the granter, thus:—"to have " nominated, designed, and constituted, likeas, by the tenor " hereof, *failing of heirs male lawfully to be procreated of " my own body*, I nominate, design, and constitute *James " Menzies*, my great grandchild, eldest lawful son to Captain Archibald Menzies, son lawful to the deceased John " Menzies, sometime of Stix, my brother german, " whom failing, to other heirs of tailzie therein mentioned, &c. " **TO BE " HEIRS OF TAILZIE.**" In another part of the deed, namely, the dispositive clause, it ran in these terms:—"And for " further security thereanent, I hereby, with and under the " express conditions, burdens, restrictions, reservations, and " limitations above and under written, and failing of heirs " male of my own body, as said is, sell, annailzie, and dis- " pone to the said Captain Archibald Menzies in liferent, " during all the days of his lifetime, (for his liferent use al-

"lenarly, of the just and equal half of the rents, annual rents, and other profits of my hail free estate, real and personal, above and after specified, in manner after expressed), and to the said James Menzies, my great grand-child, and the heirs male of his body; which failing, to the next son to be procreated of the said Captain Archibald his body, and the heirs male of his body," &c.

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When the estate devolved on James Menzies, then a minor, his title was made up as if the fetters of the entail applied to him. But afterwards, and there being a prospect, from the failure of heirs male of his body, and other substitutes, of the estate going to John Stewart, the appellant's father, he executed a supplementary deed of entail, so as to open the succession to his female issue, being his own daughters.

1773.

The question then came to be, Whether, by the conception of the deed 1697, the conditions or fetters were imposed upon James Menzies, the respondent's grandfather, as well as upon the other persons or heirs of entail, so as to debar him from altering the order of succession? The discussion of this question chiefly turned on the point, whether James Menzies was a substitute heir of entail, or an institute, or rather, a conditional institute. It was maintained by the respondent, in defence, 1. That James Menzies, her grandfather, who was to be considered as the maker of the new entail under reduction, was not an heir of tailzie under the entail 1697, but an immediate disponee or fiar, against whom the prohibitions and irritancies were neither directed, nor could by implication, be extended. 2. That though he was to be considered an heir of entail under Colonel Menzies' deed of 1697, nothing therein could bar him, or any heir, from adding to that entail, and making a new one, to take effect when all the substitutions in the old were exhausted.

The appellant, in answer, maintained, 1. That by the clear language and meaning of the tailzie 1697, James, the institute, was included as an heir of tailzie; and that he was described as such in every part of the deed; and that his situation could not be different from that of the other substitute heirs. 2. That no person taking an estate under the fetters of a strict entail, could make a new entail of the estate, so as to have any effect against the substitute heirs in the original entail, who did not represent him in any other way than as heirs of entail.

The case was reported to the Court by Lord Monboddo,

1801. and thereupon the Lords pronounced this interlocutor :—
 ——— “ Find that an heir of entail under the deed 1697, had no
 MENZIES, &c. “ power to make such a supplementary deed of tailzie as the
 v. “ one now in question ; but find that James Menzies of
 BERNARD, “ Culdares was not an heir of entail under the deed 1697,
 &c. “ but a disponent, and therefore had power to make the
 June 24, 1785. “ deed 1773.” On reclaiming petition the Court adhered.
 Dec. 6, 1785. “ Against these interlocutors an appeal was brought to the
 House of Lords.

Pleaded for the Appellants.—The judgment of the Court below proceeds upon the idea that James Menzies took the estate in fee simple, or as institute or disponent, upon the hypothesis, that whatever might have been the intention of the maker of the entail, he had not subjected James to the conditions thereof in clear and precise terms, the whole limiting clauses being so expressed as to apply only to heirs, and not to the institute, or person first named in the destinations ; and, in support of this doctrine, the case of Edmonstone of Duntreath was referred to. But, when the circumstances of that case, as well as of all other cases, are referred to, and compared with those of the present, there appears a material difference. In the case of Duntreath, the entail was in the form of a direct disposition by the maker to his eldest son Archibald, in the first place, and where the conditions were in the sequel of the deed imposed upon him only, it was not unreasonable to presume that he omitted his son, the institute, *ex proposito*, yet as the deed itself contained indications of his including Archibald under the description of an heir, the judgment of the Court of Session was, finding *Archibald* bound by the conditions : and although a different judgment was pronounced by your Lordships’ house, the ground of the decision was evidently that an entail was not to be raised up by implication, if the words were at all ambiguous, or did not clearly warrant such a construction. The judgment declared, “ That the appellant being *fiar* and “ disponent, and not an heir of tailzie, ought not by implication from other parts of the deed of entail, to be construed within the prohibitory, irritant, and resolute clause “ laid only upon the heirs of tailzie.” The present appellant has no occasion to combat the principle so laid down. He does not require the aid of implication, or inference drawn from disconnected parts of the deed, in order to bring James Menzies within the fetters of the entail. He proceeds upon the language of the entailer used in his entail, ex-

pressed from beginning to end, with sufficient clearness, and which clearly includes James Menzies within the fetters as an heir of entail. The deed here is not a disposition direct to James Menzies, as in the Duntreath case, but a nomination of heirs; and, beyond all question, James Menzies, in this nomination, is called as an heir of entail among the rest, and an heir too who is only to take *after preceding heirs*. He lays the fetters on all his heirs without exception, and, of consequence, on James Menzies as an heir. He cannot be distinguished from the rest without interpolating—without annihilating, or without imagining a clause; but as this would be contrary to every principle of construction, and contrary to the words of the deed, such a proceeding cannot be resorted to. These words in the nomination clause are, “*Failing heirs male of my own body, I nominate, design, and constitute James Menzies, my great grandchild, and the heirs male of his body; which failing, &c. to be my heirs of tailzie and provision;*” nothing can be more clear, more free from ambiguity than this. The *first heir of entail* called *per expressum* of this entail and nomination, is James Menzies, and he is included as an heir of entail, and, consequently, the prohibitions and irritancies apply to him. The only thing in the deed, therefore, which raises the present question, is a variation of expression when you come to the dispositive clause. This clause was not a necessary part of the deed, and appears *ex superabundante*, put inaptly into it, though expressly, “for their further security;” he did thereby “failing of heirs male of my body, as said is, sell, annailzie, and dispone to the said Captain Archibald Menzies in life-rent, and to the said James Menzies, my great grandson, and to the heirs of his body, which failing,” &c. in fee. The utmost effect of this clause was, to save a service and retour as heir of tailzie.

Plended for the Respondents.—James Menzies, the respondent’s grandfather, was in no shape an heir of entail under the deed 1697, fettered with the prohibitory, irritant, and resolute clauses therein contained, but a disponee or institute, against whom these clauses were neither directed, nor could by implication be extended. As such disponee or institute, he had full powers to have defeated the entail 1697 in toto, and much more so was he entitled to execute the supplementary entail now in question, agreeing in all respects with the original entail, and only adding to the substitution thereof, a certain series of heirs to succeed when the former should be exhausted.

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1801. After hearing counsel,

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LORD CHANCELLOR ELDON said,—

“ My Lords,

“ The present appeal is brought against two interlocutors of the Court of Session, of the 24th of June and 6th of December 1785 [Here his Lordship read the words of the interlocutors.]

“ It appears, that by a charter in 1697, certain estates were settled by Colonel Menzies, under clauses prohibitory, irritant, and resolutive, which were to be binding on his heirs of tailzie; but it has been contended, in the present case, that James Menzies, one of the persons mentioned, was a donee, and not an heir under this deed, and consequently had power to execute a subsequent deed in 1773. This last mentioned deed purports to carry on the entail in continuation after the limitations already made by the former entail should expire; and the appellant contends that such prolongation, if effectual, would narrow his powers over the estate.

“ It has been stated, that the construction of the deed 1697 is involved with that of certain other instruments. By one of these, a charter in 1651, Colonel Menzies and his eldest son take the estate to the Colonel in liferent and to his son in fee, with certain other substitutions, reserving a power to the Colonel to dispose of the estate without consent of his son. By another charter in 1675, a settlement of the estate was taken in the following terms.—[Here his Lordship read the destination in the charter, the reserved power to nominate heirs of tailzie and provision, &c.]—These two charters relate only to the estate of Culdares, since disposed of by the family, and on which they have only retained a feu-duty of £20 Scots.

“ But the family had also acquired other property before the date of the deed 1697, by several instruments of conveyance, which it is unnecessary to state particularly to your Lordships. The investitures as to this other property, were taken to Colonel Menzies, “ and the heirs male of his own body, whilk failing, to his heirs of tailzie “ nominate or to be nominate,” &c.

“ Colonel Menzies having thus, by the charter 1675, and other deeds, such an interest in the estates in question, and such a reserved power of nomination of heirs, and of disposition, as I have stated, in 1697, after the death of his eldest son Archibald, executes the deed on which the present question arises.

[Here his Lordship read the recital and nomination of heirs contained in the deed 1697 at length.]

“ Your Lordships will perceive, that so much as I have now read is a pure nomination of heirs of tailzie and provision. Colonel Menzies first recites his reserved powers to nominate, and then executes the nomination upon the ground of such reserved powers. And as to all his estates, it is proper that I should state again, that he had these reserved powers of nomination.

[Here his Lordship read the dispositive clause, and the other clauses in the printed cases, founded on by the parties.] 1801.

"The words, "heirs of tailzie," in these clauses, are applied to James Menzies, as well as the others called to the succession; and it is impossible to entertain any manner of doubt that, under these words, Colonel Menzies meant to include the disponente. MENZIES, &c.
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&c.

"The questions arising upon this deed are, 1. Whether or not James Menzies was only a disponente? And, 2. If he was a disponente, Whether the cases already decided be not authorities applying here to show that the clauses prohibitory, irritant, and resolute, do not apply to him, though expressly nominated an heir of tailzie?

"I need not mention many of these decided cases. That of *Duntreath* and others have gone this length; the authors of deeds had applied the words, "heirs of tailzie," in such manner as to leave no doubt of their intention to include the disponente; but your Lordships have held, that the fetters of an entail ought not to be extended by implication; and that, however strong the intention might appear, from a want of strict propriety in the use of legal terms, these fetters should not be applied to disponents. Vide ante vol. II. p. 255.

"Of these cases, it would not be proper to speak. I have always held it to be improper that judges should interfere to loosen restraints upon property that are deemed fit to be continued by the Legislature. I entertain great doubt if it be a wholesome mode of proceeding, instead of submitting the consideration of the law, in its proper place, to the Legislature, thus to frown upon it in courts of justice.

"Upon the case now before your Lordships, in that view which I entertain of the manner in which courts of law should proceed, as well as from its own circumstances, I incline to think that it should be submitted to the review of the Court of Session. The former decided cases have not its peculiarities. In none of these was there a reservation of adopting this mode of conveyance, an authority reserved over the property by prior deeds, of nominating heirs of tailzie. It was in execution of such an authority that Colonel Menzies names James Menzies an heir of tailzie.

"This authority applies not only to the estate of *Culdares*, but to all the other estates contained in the deed 1697. We find it slightly mentioned in the printed papers, that the disposition alone was effectual as to the bulk of the property, because a nomination *per se* was ineffectual, and the estate of *Culdares*, as remaining at the date of the deed, was of small value. But this is an erroneous view of this point, which does not seem to have been duly considered.

"He expressly nominates James Menzies, as well as the other persons, his heirs of tailzie and provision; and the prohibitive, irritant, and resolute clauses apply to him directly, and not in any manner by implication. He afterwards goes on to disponent the property; but this, he says, is for the further security of the nominees, his heirs of tailzie.

1801. “ Amongst other parts of the deed, I may refer to the clause directing the application of a part of the rents for the use of *his heirs of tailzie*. I think it was impossible to maintain that James Menzies was not entitled to those rents. This may also be illustrated by construction of the clause relative to the name and arms.

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“ From the case of Duntreath and others, I think it may be fairly inferred as established, that the fetters of an entail shall not be applied to the disponent by implication; but, in the present case, there is a nomination of certain persons to be *heirs of tailzie* and provision and a direct application of the prohibitory, irritant, and resolutive clauses to them, including James Menzies.

“ The present appeal has remained in this House for a great many years, the reason of which has not been distinctly explained. I think, upon a view of the whole matter, that it ought to be remitted to the Court of Session for farther consideration.

“ I therefore move that the cause be remitted to the Court of Session, to review the interlocutors, so far as complained of, and consider whether James Menzies, being expressly nominated and appointed an heir of tailzie by the first part of the deed 1697, although made disponent or institute by the latter part thereof, was not comprehended in the prohibitory, irritant, and resolutive clauses, imposed on the heirs of tailzie of the granter; and to consider such point both so far as respects the estate contained in the charter 1675, and the other estates of the granter comprised in the deed 1697.

Ordered and adjudged that the cause be remitted back to the Court of Session in Scotland, to review the interlocutor complained of generally, and particularly consider whether James Menzies, being nominated an heir of tailzie by the first part of the deed 1697, although made a disponent or institute by the latter part thereof, was not comprehended in the prohibitory, irritant, and resolutive clauses imposed on the heirs of tailzie of the granter, and to consider such point, both with reference to the estate comprised in the charter 1675, and the other estates of the granter comprised in the deed 1697.

For the Appellants, *W. Grant, Henry Erskine.*

For the Respondents, *R. Dundas, J. Montgomery.*

NOTE.—*Vide* subsequent appeal in this case, for what was done under this remit, both in the Court of Session (18th Jan. 1803 not reported,) and in the House of Lords (20th July 1811.)

<p>ROBERT BOGLE, junior, Merchant, Glasgow, and JOHN and ANDREW BLACKBURN, St. Thomas, in Island of Jamaica, and MARION and MARTHA BLACKBURN, all Children of PETER BLACKBURN, Merchant, Glasgow,</p>	<p>} <i>Appellants;</i></p>	<p>1801. <hr style="width: 50px; margin: 0 auto;"/> BOGLE, &c. <i>v.</i> ANDERSON, &c.</p>
<p>MARGARET ANDERSON, Wife of JAMES STEW- ART, Watchmaker in Glasgow, only Daugh- ter of the deceased JAMES ANDERSON, late Manufacturer in Glasgow, in her own right, and as executrix dative to her de- ceased Father, and to her Brother, the Rev. JOHN ANDERSON,</p>	<p>} <i>Respondents.</i></p>	

House of Lords, 13th Nov. 1801.

MANDATE—ATTORNEYS—FOREIGN.—A power of attorney was executed, by parties in this country, to uplift and administer estates of a person deceased in Jamaica, and to remit the proceeds. The attorneys in Jamaica, after selling a plantation estate for £5000, remitted the proceeds, in bills, to their correspondents in this country, with instructions to hand them over to the executors or heirs, if they all agreed in granting a discharge, and an obligation to refund, if the funds received fell short to pay the deceased's debts. This was agreed to by the executors; but the parties to whom these bills were remitted, still refusing to deliver them, an action was raised to compel them. They agreed to consign the bills, with the exception of one, from which they claimed a deduction of their accounts, as agent for the attorneys in Jamaica. Held the agents bound to consign the full amount, without such deduction. Objection to their liability to account in this country repelled.

James and Robert Anderson, brothers of the respondent, went in early life to Jamaica. James died in 1791, leaving all his means, by will, to his parents, residing in Glasgow, in liferent, and, after their death, to his brother Robert, his sister Margaret, and his other brother John, in fee, equally among them. This will appointed his brother Robert, along with Mr. Gardner, both in Jamaica, his executors. for the purpose of executing the will. On Mr. Gardner's death, Alexander Park succeeded to the management; and, in the spring 1794, Robert Anderson himself died; whereupon the respondent, and the other relations in Scotland, executed a power of attorney in favour of the appellants, John and Andrew Blackburn, and Alexander and Keith Jopps, all of the island of Jamaica. This power of attorney empower-

1801. ed them to obtain administration of the defunct's estate, to convert the same into money, and remit the proceeds.

BOGLE, &c. The attorneys entered on the administration, and sold
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 ANDERSON, &c. plantation estate for £5000, and there were two bonds due to the deceased of £900 and £500. In a letter written to
 Sept. 12, 1794. John Blackburn, of this date, to John Anderson, he says, in so far as seen, "it appears to me, after paying all debts and every charge, that there will be a clear remainder of near £5000 sterling."

The price of the plantation was paid by the purchaser in five bills, at long dates, for £1000 sterling each, and payable to the order of Alexander Jopp and John Anderson or Hibbert, Fisher, and Hibbert of London.

Dec. 13, 1794. Of this date, the attorneys wrote to their correspondent in Glasgow, Mr. Peter Blackburn, since deceased, and Robert Bogle, the appellant, in the following terms:—"Under cover you will receive the four first sets of bills, which you will hold subject to our order, as we are not yet advised how the subject is to be divided, nor informed what proportions will arise from the separate estates; but if the whole family, jointly and severally, join in giving you receipt, (the form of which you will draw by advice), and become bound to refund to us, if the funds we have received fall short of paying the debts, you may give them the whole bills. As soon as possible, we will get accounts made up and transmitted; and we will, at same time, take legal advice as to the division, and in as much as possible separate the estate accounts. We are very happy to have disposed of this property so advantageously, and to have got so considerable a part of the proceeds so easily remitted. The heirs need not be alarmed at our taking them bound to refund—it is only matter of form. We flatter ourselves with remitting them near £1000 more when every thing is settled. If we did not think we had funds enough in our hands to pay all debts, we should have reserved more. We, however, may be mistaken. All depends upon the accounts between Gardner and the donor's estate." Another letter, of same date, was written by Alexander Jopp, who, apparently differing from the Blackburns as to the prospects of the affairs, writes Bogle stating the propriety of a reservation, or condition of relief with regard to debts that might emerge after the bills were
 Dec. 13, 1794. delivered up. He says, "On the subject of Anderson's affairs, in addition to the joint letter to you and Peter

" Blackburn, I think it proper to say, that in consequence
 " of a letter received, (which John Blackburn had not seen
 " when he wrote), from Mr. Park, one of the executors of
 " Mr. Gardner, it does not appear to me that so much is ex-
 " pected from that quarter as John Blackburn apprehend-
 " ed; and as a good deal evidently depends upon that, as
 " to the remaining funds here, I advise that, for the pre-
 " sent, you do not deliver up the bills, at least unreserv-
 " edly; but the heirs should not want any thing."

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The remaining price, after remitting the four bills, was
 retained to meet the debts due by the defunct in Jamaica.

The heirs were for some time kept ignorant of the arri-
 val of these bills; but, when apprised of it, they applied for
 delivery of the same, and, on being refused, they raised the
 present action, by petition to the sheriff, for their delivery.
 After various procedure, the sheriff, of this date, found that Nov. 5, 1796.
 the bills in question were the property of the petitioners;
 that the defenders had assigned no sufficient reason for re-
 fusing to deliver them up; and that they ought to have been
 delivered over to them on their arrival. "Therefore, or-
 " dered them to be delivered up accordingly, the petition-
 " ers granting a receipt to the defenders in terms of the be-
 " fore-mentioned paragraph or letter, and containing an
 " obligation to keep the attorneys *indemnes* at the hands of
 " the heirs of Margaret Paton," (Anderson's mother.) On
 advocacy of this judgment, Lord Meadowbank ordered Nov. 26, 1796.
 " production and exhibition of all letters and correspond-
 " ence, or excerpts thereof, between them and the attor-
 " neys of the original pursuers, in so far as the same re-
 " spects the affairs of the said pursuers, and to depone
 " thereupon as in an exhibition; and also to exhibit and
 " produce at the bar the whole bills transmitted to them by
 " the said attorneys; and, in the meantime, prohibits, inter-
 " dicts, and discharges them from indorsing, giving away, or
 " disposing of any of the bills in their custody." They acqui-
 eaced in giving up the bills, with the exception of part of
 one, as to which the subsequent procedure occurred; these
 bills having been paid, the defenders, after some opposition,
 were ordered to consign the amount, £1000, which they did, Jan. 21, 1797.
 ledeductions amounting to £266. The question assumed the
 nature of an accounting, and the attorneys' accounts were or-
 dered to be produced, but were not. And his Lordship finally,
 of this date, pronounced this interlocutor, whereby he ordained Mar. 10, 1798.
 " the defenders to consign in the same hands, and in similar

1801. " terms, as was done with respect to the sum of £266. 4s. 8d.
 " sterling, the further sum of £617. 10s. 4d. sterling, an
 BOGLE, &c. " that on or before the 15th day of May next ; and desire
 v. " to hear parties at the Ordinary's first hour in the summer
 ANDERSON, &c. " session, on the question, Whether farther proceedings in
 " this process should not be sisted, until a regular exoneration
 " tion of the attorneys in Jamaica, with a balance constituted
 " tuted for or against them, is produced in process, without
 " prejudice to the pursuers applying for and obtaining warrant
 " rant to uplift the consigned sums, and even to proceed
 " against the defenders for the remainder of the sums in
 " committed with by them, and to the defenders their defence
 " ces, in case the attorneys delay the obtaining such exoneration.
 " operation." *

* Note by LORD ORDINARY (MEADOWBANK).—The defenders are mistaken in supposing that an unfavourable impression of them was made on my mind, owing to past circumstances that could be explained. I presume the conduct of the cause, in its commencement is alluded to ; but they may rest assured that has left no impression whatever, for, at the time, I attributed it to what has since appeared to be its true cause. On the other hand, I entertain personally high opinion of the character of the defenders, and particularly one of them, whom I have the honour to be acquainted with. But the best men are subject to error ; and, especially, no person entitled to hold himself exempt from it in a case where his conduct has any concern.

In the first place, I think the defenders mistake the fact very much, when they plead, that they were entitled to put the sum paid, to the credit of the attorneys in Jamaica, by the terms of the mandate of December 1794. That mandate by no means directed them to hold the bills subject to the order of the attorneys ; the order was only given for the especial case of the pursuers differing among themselves, which has not occurred, and Mr. Jopp's proposition goes no farther in restraining the defenders, than to direct that the bills should not be delivered up unreservedly, by which could be meant nothing more, than that the defenders should preserve, in favour of their constituents, a reasonable lien for security of their reimbursement of unforeseen expenses, in case these should unexpectedly be requisite. In no view possible, therefore, were the defenders entitled to consider the £2000 sterling in question as funds of the attorneys, on which the defenders might operate in conducting their private affairs.

2. I think the defenders were bound to have given instant intelligence to the pursuers of this valuable remittance for their behoof

In a reclaiming petition, the ground maintained here, and throughout by the defenders, was, that they, Blackburn and Bogle in Glasgow, were mere agents or mandatories for Blackburn and Jopp in Jamaica, they lay under no obligation

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and, if in distress at the time, it was the more fitting that they should be informed speedily of what might change the current of their thoughts, and so alleviate them.

3. It appears to me a question, not altogether without difficulty, Whether the attorneys, after giving their mandate of December 1791, could operate at pleasure on the £2000, which the defenders got into their hands, by availing themselves of the indorsation of the attorneys on two of the bills? Had the defenders deposited the bills in the hands of Scott, Moncrieff and Dale, reserving a lien for reimbursement, (which perhaps, or something like it, in a fair construction of the original mandate, should have been done), this lien could not have been made effectual till the attorneys constituted a balance in their own favour, by obtaining an exoneration in the proper court. Now, ought not the defenders to be held as trustees, standing in the place of the agents of the Royal Bank, and not entitled to transfer the fund, or any part of it, back to the attorneys, without legal authority, especially subsequent to the commencement of the pursuers' proceedings in law?

4. But supposing that Mr. Jopp's expression, 'I advise you not to deliver up the bills, at least unreservedly,' should be held to warrant the defenders' levying the funds, to the effect of enabling the attorneys to operate upon them, I still conceive, that after what the attorneys wrote in December 1794, concerning the probable result of the business, and all that has yet been specified, as to emerging debts, it will be difficult for the defenders to maintain that they are entitled to apply so large a sum as £563. 15s. 4½d. of commission, to the private benefit of the attorneys, upon no other evidence than a charge to that amount made by the attorneys. This is emolument, not indemnification for advances; and, consistently with what is stated December 1794, and the amount of emerging debts, could hardly, I think, have been then in contemplation of the attorneys.

5. Why do not letters appear from the attorneys expressing their change of views of the affairs? Why, also, do they not get themselves exonerated in Jamaica, either judicially or extra-judicially, as attorneys, from the pursuers? or why do they not send materials by the conveyance of a ship of war to account in this country?

6. The charge for remitting the monies advanced to the pursuers out of their own funds, as by a remittance of cash from Jamaica, appears to me unjustifiable, and calculated merely to affect the apparent balance.

7. Considering, however, the affidavits, even without the inven-

1801. **BOGLE, &C. v. ANDERSON, &C.** tion whatever to the respondents, unless in consequence orders given them by their constituents; that the order in December 1794, concerning delivery of the bill was a qualified order; that whether qualified or not, might at all events be recalled by the Jamaica attorney that these attorneys were not bound to account in the country, but in Jamaica only; and that, from an examination of their accounts, it appeared that the balance in the attorneys' hands was only £383, so that there was no ground for ordering the consignment of more than £177 over that already consigned, £266.
- June 21, 1800. The Lord Ordinary, of this date, pronounced this interlocutor, conjoining the process of wakening and transferring raised by the respondents after Mrs. Anderson's death, with the former process. And, of this date, ordained "the defenders to consign the sum of £617. 10s. 4d., in terms of the interlocutor of the 10th March 1798; and in case they fail so to do, finds the defenders liable in the expenses of extracting an act and warrant for the recovery of the said sum, and allows said act and warrant to go out as if be extracted in the name of James Marshall, W. S., for the purpose of his consigning the said sum, in terms of the said interlocutor, and decerns." On reclaiming petition the Court adhered.
- Nov. 12, —

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The appellants, as the managers or mandatories of the attorneys in Jamaica, are not responsible for the correctness of any accounts transmitted from Jamaica by the administrators, nor for the propriety of any charge made by them against the estate; but such accounts and charges must, as between the appellants and respondents, be taken as conclusive. Acting in this capacity they are responsible only to their constituents in Jamaica

tory or appraisement of the succession, as a sort of *prima facie* evidence of the actual advances, it strikes me, that it is fit to order consignment of what is only claimed as a reward for trouble, and what was improperly stated as a charge of remittance never incurred. The attorneys, I apprehend, cannot complain if they are not rewarded till they account, especially as there is apparently a *mora* in the case for not already accounting regularly, which, as long as we have ships of war to convoy our fleets, may be done, even in this country as I apprehend, as safely in war as in peace.

and are not authorized to pay more to the respondents than their principals admit to be due; and, consequently, whatever remedy the respondents insist in against the appellants must be limited by the same authority. Their proper remedy undoubtedly was against the attorneys in Jamaica. They are not, although they ought to have been, called as parties to this suit, but even supposing them to have been called as parties, still, as the subject matter is such as ought only to be brought before the courts of Jamaica, where the defuncts were domiciled, where the administration of their estates was granted, and security given by the administrators to account, the Court of Session had no jurisdiction over the matter; even supposing it had, yet it is manifest that the claims on the administrators in Jamaica ought to be determined by the laws of Jamaica, and not by the laws of Scotland. By the law of Jamaica, the claim of commission charged was perfectly unexceptionable.

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Pleaded for the Respondents.—Had Mr. Bogle and the late Mr. Peter Blackburn done their duty in regard to the mandate transmitted to them from Jamaica, in the letter of Messrs. Blackburn and Jopp, dated 13th Dec. 1794, no such question as the present could ever have occurred. In compliance with the terms of that letter, which was expressly written “for the information of the heirs,” they ought, immediately on receipt thereof, to have communicated to the relations of the deceased, the information which that letter conveyed, and in which those relations had so deep an interest. They ought also to have delivered over all the four bills at that time transmitted to them by Blackburn and Jopp. And there was not the least ground or excuse, neither on their part, nor on the part of the attorneys in Jamaica, for retaining the contents of the two first bills, or any of the bills. But even allowing the appellants every latitude in the construction of the conditions annexed to the mandate, as also of the power of revocation, competent to the granters of it, no reason has been assigned for carrying either the one or the other beyond a security for reimbursement of actual expenditure, and indemnification of obligations come under by the attorneys. The very accounts, however, which those gentlemen themselves have produced, show that there is a large balance in their hands, after reimbursing them completely, and that they are further possessed of a sufficiency of fund for answering all the claims they have been able to specify. In these circumstances, even if

1801. the appellants could make it appear that they were warrant-
 ed in withholding the bills, yet there would not be any
 ground of pretence, either for them or their constituents
 contending, that they are entitled to retain the value of the
 bills, to the effect of satisfying their own unauthenticated
 claims. The attorneys are liable to account in this country
 from the particular circumstances of this case. It was a con-
 dition, understood by both parties, at the time the power
 attorney was granted, that they were to account to the co-
 stituents in Glasgow; and, accordingly, upon this under-
 standing the attorneys themselves had acted, by transmitting
 accounts from time to time, although these were in the
 selves defective, and liable to exception. Besides, the fund
 is now really in this country, and the remittance of that
 fund, shows at once that they were so liable to account.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained
 of be, and the same are hereby affirmed.

For Appellants, *R. Dallas. J. Scarlett.*

For Respondents, *W. Grant, W. Adam, T. W. Baird*—

NOTE.—Unreported in the Court of Session.

JOHN PHILIPS, Merchant in Glasgow,	<i>Appellant;</i>
MESSRS. BLAIR and MARTIN, Spirit Dealers } and Merchants in Greenock,	<i>Respondent</i> —

House of Lords, 16th Nov. 1801.

CONTRACT OF SALE—DELIVERY IN REASONABLE TIME—DAMAGES
 FOR NON-FULFILMENT. — A sale of 12 puncheons of spirits
 distilled from molasses, was bargained for, and four puncheons
 delivered. The buyer continued urging the delivery of the
 remainder, but the sellers delayed, until after an act of par-
 liament was passed on 18th Dec. 1795, prohibiting distillation
 of spirits from molasses, and annulling all bargains or contracts
 for the delivery of such. The sellers refused to furnish the
 spirits, and, in action, stated this defence, that having had
 three months to deliver, and the act of parliament having been
 passed in the interval, they were not bound; Held in the Court
 of Session, that there was no evidence to show that the sellers
 were bound to deliver before the 18th Dec. 1795. Reversed in

The House of Lords, and held, that from the correspondence adduced, the sellers were bound to deliver the remaining puncheons within reasonable time, and therefore before the 18th Dec. 1795, the date of the passing of the said act, and remit, made to the Court of Session to assess the damages.

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Action of damages was raised by the appellant against the respondents, for failure to execute a contract of sale of 2 puncheons of spirits sold by them to him; and concluding that they should be ordained to make payment of £ 134. 2s. 7d., being the difference of the price at which the appellant could have sold them as on 24th Dec. 1795, and the price at which they were purchased from the respondents.

The sale took place on 5th Nov. 1795; the spirits being those distilled from molasses at 6s. 9d. per gallon—strength one in ten under hydrometer proof. Four of these puncheons were delivered on 12th Nov., with invoice of same date, bearing "*that the rest will be sent as soon as we can get casks to hold them.*" When the four puncheons arrived, the appellant found, on examination, that the strength of the spirits was only one to eight under hydrometer proof, and immediately apprised the respondents of this, and desired the difference might be settled. One of the respondents accordingly called in the end of the month, and informed the appellant that the remaining eight puncheons were ready, and that he would send them as soon as he could get casks to put them in, and they were to appoint a friend to examine the spirits already sent, to ascertain the deficiency of strength.

Several letters followed, pressing the respondents to settle the deficiency of the four puncheons, and to forward the other eight. The respondents wrote in answer, stating, Dec. 10, 1795. "You know that we had eight weeks to deliver you the spirits, which will not expire for these three weeks to come, *by which time we suppose they will be ready.* Mean- time we wish you to send what puncheons you have of ours, as we are truly scarce of that article. You will please on receipt make up as many molasses as you can, being of the forty puncheons you have to deliver us from this to the 5th February. Your answer will oblige." In answer, the appellant wrote, "It is rather surprising you decline an answer respecting the deficiency in strength on the four puncheons of spirits furnished on the 12th ultimo. *This is now the fifth time I have written to you on the subject.*" They still lie in the same state as they were received from

1801. "you. Had you been punctual, you might have had
 PHILIPS "all your empty puncheons before this time; and indeed I
 v. "consider it a very great inconveniency that I have not
 BLAIR, &c. "liberty to dispose of them till this matter is settled. *As*
 "to the time you mention to have for delivery of the remain-
 "ing eight puncheons of spirits, I do not recollect any being
 "mentioned; besides, when your Mr. Blair was here, im-
 "mediately after receiving the four puncheons, he said the
 "remainder was ready, and would be forwarded so soon as
 "you could get puncheons to hold them. Respecting the
 "molasses, I have delivered all that bargain was made for.
 "Waiting your answer, I am," &c.

Dec. 15, 1795. The respondents' answer to this letter was as follows:—
 "We have received yours, and shall give orders to some
 "friend to examine how much it is weaker than five in
 "eight underhydrometer of Clarke's instrument, which is the
 "strength we sell at to Gardner and Strong and others.
 "Had you furnished us with puncheons, you might have
 "*had some of the eight puncheons long ago*; but as we have
 "no puncheons, we always give the spirits to those who
 "provide puncheons themselves. Respecting the molasses,
 "we shall try whether or not you have delivered all your
 "quantity, yea or nay,—we are accordingly to take a pro-
 "test against you. As for molasses puncheons, we can-
 "furnish you with 20, 30, or 40, which were only once fill-
 "ed, price 5s. 3d. free on board a gabbar at our quay—
 "Should they answer, let us know in course."

Before any thing further took place, an act of parliamen-
 was passed, 18th Dec. 1795, prohibiting all distillation in
 Great Britain from molasses, and declaring all contract-
 and bargains for the delivery of such spirits, during the sub-
 sistence of the act, void and null.

The deficiency as to strength in the four puncheons ~~was~~
 adjusted and settled on the 24th Dec. 1795, by proportion-
 al abatement being given. And when the appellant ~~again~~
 wrote, urging delivery of the remaining eight puncheons of
 spirits, the respondents finally in answer wrote thus:—"In
 Jan. 22, 1796. "answer, we will send you no spirits. Your usage to us in
 "the molasses transaction was dishonourable on your part,
 "which you must be very sensible of, and are," &c. Where-
 upon the present action was brought by the appellant.

In defence, it was stated, that "by the terms of the de-
 "fenders' agreement with the pursuer, they only became
 "bound to deliver three or four puncheons of spirits upon

" the week after the agreement, viz. 5th Nov. last (1795),
 " which were delivered accordingly; but with regard to the
 " remaining eight puncheons, which the pursuer commis-
 " sioned, the defenders were only bound to furnish these in
 " the space of between two and three months thereafter;
 " but, in the meantime, the law (already mentioned) stop-
 " ping distilleries from distilling from molasses passed, by
 " which all contracts for the delivery of spirits posterior to
 " the 18th Dec. 1795 were voided, and of course the con-
 " tract betwixt the pursuer and defenders came to an
 " end."

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After a proof of the respective averments of the parties,
 the Lord Ordinary pronounced this interlocutor:—" Finds June 30, 1798.
 " there is no sufficient evidence of the pursuer's allegation,
 " that, by the agreement of parties, the defenders (respon-
 " dents) were bound to deliver the eight puncheons of
 " whisky in question before the 18th day of December 1795,
 " and therefore sustains the defence founded upon the 36th
 " George the Third, cap. 20, assoilzies the defenders (re-
 " spondents) and decerns, superseding extract until the
 " third sederunt day in November next." On representa-
 " tion the Lord Ordinary adhered. And, on reclaiming peti-
 " tion to the Court, the Court adhered.

Nov. 13, 1798.
 Dec. 4, 1799.
 Dec. 18, 1799

Against these interlocutors the present appeal was
 brought to the House of Lords.

Pleaded for the Appellant.—The interlocutor of the Lord
 Ordinary proceeded on a mistake, in finding that there is no
 sufficient evidence of the appellant's allegation, that by the
 agreement of the parties the respondents were bound to deli-
 ver the eight puncheons of whisky in question, before the 18th
 December 1795; for the appellant having established that
 twelve puncheons were purchased, and four delivered, it was
 incumbent on the respondents to prove that a distinction had
 been made in the transaction as to the remainder. What
 is here stated in the Lord Ordinary's interlocutor is not an
 allegation made by the appellant. It is the allegation upon
 which the respondents rested their defence, as stated in
 their defences, viz. that Mr. Blair agreed that the appellant
 " should have twelve puncheons also, but that his prior en-
 " gagements rendered it impossible for him to deliver these
 " in less time than from two to three months, excepting
 " with regard to three or four puncheons, which should be
 " delivered upon the week following." Then it lay upon
 them to prove the fact on which they rested their defence.

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They had, however, not only failed to do this, but they had made contradictory averments, which were also proved to be unfounded by evidence in the cause. In their defences, they aver that they were to be allowed two or three months, for delivery of the whisky, whereas, in their letter, they state they were to have eight weeks to make this delivery, when they add, "they suppose they will be ready." But this last assertion is totally at variance with the advice sending the four puncheons, and their verbal assertions, which expressly declare that these were ready, and would be sent as soon as casks could be got to hold them. The agreement, therefore, to sell twelve puncheons of spirits, four of which were delivered about ten days thereafter, is fully made out, and was afterwards recognised in two instances prior to the 36th Geo. III., upon which the respondents rest their defence. This being the case, and as it is clear from the respondents' own argument, that they were not only bound, but were also in a situation to fulfil this contract before the 18th Dec.; that they had twice, before that date, intimated that the spirits were ready for delivery, it follows that the act of parliament cannot apply to this contract, which expressly has reference to spirits distilled subsequent to the 18th December. They were, moreover, bound to deliver the spirits before the operation of the statute. At least the respondents have failed to produce evidence to the contrary of that afforded by the proof, which clearly shows they were so bound to deliver before the operation of the statute.

Pleaded by the Respondents.—There is no evidence that, by the terms of the bargain, the respondents were bound to deliver the twelve puncheons of spirits immediately after the bargain was concluded. On this point the appellant, after offering a proof thereof, and so admitting that, without such proof, he could not recover, has totally failed. David Hynd, the only person present when the bargain was made, did not hear of any time mentioned for the delivery of the spirits; but even if he had deposed that the bargain was as stated by the appellant, his single testimony would not be sufficient to prove the terms of the bargain, as, by the law of Scotland, two witnesses are necessary to prove a bargain. Nor does the correspondence help out this defective proof; on the contrary, one letter written by the respondents shows that they were not obliged to deliver the remaining eight puncheons of spirits sooner than eight weeks from the date of the bargain, and as the assertion

therein contained was not denied by the appellant until some time after, and when the statute had, in the meantime, affected the rise and distillation of spirits from molasses, so there arises strong presumptive evidence that the terms of the bargain were as the respondents have stated it.

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Besides, by the act 36 Geo. III. c. 20, all contracts and bargains made by a distiller, for the delivery of spirits distilled from molasses, after the 18th Dec. 1795, are declared null and void ; and therefore the present contract falls under the nullity of the act.

After hearing counsel,

The Lord Chancellor ELDON moved a reversal of the judgment of the Court of Session, for the special reasons stated in his judgment as below.

It was ordered and adjudged that the interlocutors complained of in the appeal be reversed ; and it is hereby declared, that by the contract, of which the correspondence in process is sufficient evidence, the respondents were bound to deliver the puncheons in reasonable time, and therefore before the 18th Dec. (1795); and having failed in fulfilling such contract, the appellant is entitled to recover damages for the breach thereof ; and it is hereby ordered that the cause be remitted back to the Court of Session in Scotland to assess the said damages.

For Appellant, *W. Grant, M. Nolan.*

For Respondents, *Wm. Adam, James Montgomery.*

NOTE.—Unreported in the Court of Session.

ROBERT LEE, Merchant in Greenock,	<i>Appellant ;</i>
MESSRS. MURDOCH, ROBERTSON, & Co., Mer-	} <i>Respondents.</i>
chants in Glasgow, and WALTER EWING	
M'LAE, Trustee on their sequestrated estate,	

House of Lords, 26th Nov. 1801.

BILL—VITIATION — No VALUE — COPARTNERSHIP. — A bill was granted by a member of a firm in the Company name, to a banking company, without the knowledge of the Company, for £1000. It was thereafter renewed to the same individual for £1068, being the principal sum of the original bill, and interest. In action

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raised against the appellant, on the second bill, two objections were stated; 1. No value. 2. The bill was vitiated, by an erasure and alteration in it, from payable on demand to payable one day after date. On report to the whole Court, the Lords of Session sustained the claim to the extent of the sum of £1000 in the original bill, with interest. Reversed in the House of Lords, without prejudice to the respondents bringing a new action on the original bill for £1000.

Robert Lee, merchant in Greenock, the appellant's father, was partner in the house of Lee, Rodgers and Co., merchants in Glasgow, of which firm Robert Donald, Hugh Colquhoun, and James Wilson, were partners. This business was dissolved in 1783.

Robert Donald, one of their number, was a shareholder or partner, at sametime, in the house of Speirs, Murdoch and Co., bankers; and, besides his interest in stock, had a credit in that bank to the extent of £1000, for which Lee, the appellant's father, and Colquhoun, were sureties; but the cautioners were secured against this by Donald's stock, amounting to £4000.

The banking company of Speirs, Murdoch and Company, was dissolved by the death of Speirs, in the beginning of the year 1784, but was continued by Murdoch, Robertson and Co., who, two years after the dissolution of the firm of Lee, Rodgers and Co., wrote the appellant's father, stating that they held the acceptance of that company for £1068. 19s. 7d., and requesting payment. At such a demand Mr. Lee was not a little surprised. It was the first time he had heard of the bill. And, on appointing a meeting with Mr. Robertson regarding it, he found the transaction to stand thus: Donald, who had a credit with the bank, had overdrawn that credit to the extent of £1000, and, in order to hide this from the bank, he had taken it upon him to draw out an acceptance in the company name of Lee, Rodgers, and Co., without their permission, to serve his own individual purpose with the bank; and the bill now demanded of £1068. 19s. 7d. was a renewal of that bill, with interest. When examined on this occasion, it bore to be payable *on demand*. On ascertaining that this was the nature of the transaction—that this was not a company transaction, but an unwarrantable use of the company name, and that no value had been received for it, he refused payment, whereupon the present action was brought for payment of the £1068. 19s. 7d. bill against Lee, the only surviving partner.

The defence stated to this action was, that Lee, Rodgers, and Company had never received value for the bill; that the bill itself was erased and vitiated, in so far as the words "payable on demand," which had stood originally a part of the bill, were erased, and the words, "one day after date" substituted in their place; the object wished to be gained by this alteration, as was stated, being to subject Mr. Lee in the payment of interest upon the contents of the bill, from the month of February (being its date); And, finally, that the bill had been granted long subsequent to the dissolution of the concern.

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The Lord Ordinary ordered informations on the point, for the consideration of the whole Lords; and their Lordships, of this date, pronounced this interlocutor: "Find the defender liable to the pursuers for the sum of £1000, contained in the *original bill* granted by Lee, Rodgers, and Company, with the interest due thereon, and remit to the Lord Ordinary to allow the pursuers to amend their libel to that effect, and proceed and determine as to his Lordship shall seem just."

Dec. 4, 1799.

As this judgment seemed virtually to sustain the objection to the vitiation of the bill, £1068. 19s. 7d., for which payment was concluded; but decerned for payment of the *original bill* of £1000, which was *not* concluded for in the summons, both parties reclaimed, the respondent praying the Court to vary the terms of the interlocutor.

The Court, on advising, pronounced this interlocutor:—Feb. 11, 1800.
"Find, that the meaning of the Court, when they pronounced the judgment reclaimed against, was to sustain the claim of the pursuers to such an extent, as that the same should not exceed the sum of £1068. 19s. 7d., and interest thereof from the 23d day of February 1786, until payment: Find the defender, Robert Lee, liable in these sums accordingly; and, with this explanation, adhere to their former interlocutor; and, farther, find the defender liable in the full expense of extract; but in no other expenses."

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The bill, which is the foundation of the present action, is erased and vitiated in *substantialibus*, and therefore void, and not good to sustain action for the contents thereof. Nor is the assertion either true, or proved by the respondents, that the alteration was made with

1801. the consent of the acceptors. This allegation is not only without evidence, but is inconsistent with the declarations of Robertson and Walker, and, in the circumstances of a dissolved company, and the fact that this was a private transaction of Donald's own, altogether incredible. The instrument here has been fraudulently vitiated, not because of the uncertainty of their original tenor, but because in law the alteration necessarily cancels the original instrument; and, in refusing action on such vitiated bill, both the laws of England and Scotland agree. The bill was also rendered void and null, under the several statutes regulating the stamps for bills of exchange, where the alteration rendered a new stamp necessary. *Separatim*, As no value was given to Lee, Rodgers and Co. for the bill, and as the holders had connived at the transaction, and, besides, had been guilty of the grossest negligence in not bringing forward the bill at the proper time when due, when Mr. Lee could have operated relief against Mr. Donald's own estate, they are not now entitled to recover.

Pleaded by the Respondents.—Mr. Lee, the appellant's father, was clearly liable for the original bill, dated 20th March 1783, which was accepted in the usual manner by the managing partner of that company, under the company firm. This bill was accepted six months before it is alleged that Mr. Lee and his partners had resolved to dissolve their copartnership, and two months before the contract expired. Mr. Lee, according to the established principles of law, must be liable, as a partner of the company, for that bill, unless he can show that this case does not fall under the general rule of law, owing to special circumstances. Here there was no such special circumstances. There was no fraud. As, therefore, no good objections could have been stated to the original bill granted in the name of the company, so neither does there lie any good objection to payment of the new or renewed bill. The mere renewal does not exempt from that liability. Being bound, therefore, as a partner, to pay the one, he was also liable for the other.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of in the appeal be reversed, but without prejudice to the pursuers' bringing any action on, or in respect of the original bill for £1000, granted by Lee, Rodgers, and Company, as effectually as if they had amended

their libel according to the terms of the first interlocutor complained of.

1801.

For Appellant, *W. Adam, John Clerk.*

For Respondents, *W. Grant, Ar. Cullen.*

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NOTE.—Unreported in the Court of Session.

ALEXANDER WILKIE, late of Kingston, Jamaica, *Appellant* ;
BENJAMIN GREIG of Glasgow, Merchant, *Respondent*.

House of Lords, 1st Dec. 1801.

SALE OF GOODS—FACTOR OR AGENT—FOREIGN MERCHANT.—Circumstances in which it was held, that the purchase of goods by a merchant in Glasgow, for export to a foreign merchant, was such as made the foreign merchant liable to the party from whom the goods were bought ; although it was contended that a foreign merchant, who procures goods from a correspondent in this country, to whom he allows a commission, was not so directly liable. Reversed in the House of Lords, and held that the foreign merchant was not liable in the special circumstances of this case.

The appellant, Alexander Wilkie, was a merchant in Kingston, Jamaica ; and James Hutchison, merchant in Glasgow, opened a correspondence with him, and proposed to purchase goods in this country, and ship them out to him for sale in Jamaica. At first the transaction assumed this form. Hutchison bought the goods in Glasgow on his own credit ; but shipped them out with invoices made out by himself, titled, " Goods shipped per Cecilia, by James March 1792. Hutchison, junior, Glasgow, on the account and risk of the said James Hutchison, and Alexander Wilkie, Kingston."

In 1793 this mode of transaction was changed, at Hutchison's own request ; and, of this date, the appellant wrote May 10 and in answer, stating, " It has occurred to me to offer you an ¹¹, 1793.

" alteration in the mode of sending the goods as formerly,
" and perhaps it might be more agreeable to you, but, in
" either case, it shall be the same to me, only will save us a
" good deal of trouble. What I mean is, to send out the
" goods on my account, and you to charge a commission
" adequate to your trouble, then I shall have it in my power
" to make you remittances upon the receipt of the goods.

1801. "If this shall meet your approbation in preference
 "other way, I shall be glad to know upon receipt."
- WILKIE
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 Aug. 5, 1793. In answer, Hutchison wrote, "I have considere
 "plan of our doing business in future, and I do thin
 "clearest way for me to charge a commission. I hav
 "inquiry. The commission for goods sent out is :
 "cent., and for produce sent home two and a-half pe
 "This I shall charge for all orders. I have no fear l
 "will put me in possession of bills or produce, alw
 "good time, to make good my engagements."
- Notwithstanding this arrangement of future trans
 as changed from that of joint adventure, Hutchiso
 chased goods from several parties in Glasgow, and s
 them off to the appellant, per the ship "Satisfaction
 invoice was sent of these until some time afterwards
- Jan. 17, 1794. the invoice then sent was in these terms:—"Inv
 "goods shipped on board the "Satisfaction," Jol
 "monds, master, for Jamaica, by James Hutchison,
 "merchant, Glasgow, on account and risk, and consi
 "Alexander Wilkie." At the conclusion of this
 Hutchison's commission of five per cent. was cl
 amounting to £146. 11s. This was quite in terms w
 commission arrangement. But, several months ther
- Feb. 28, 1794. he wrote, "I have thought it proper to buy all goods :
 "name, as well as mine; and I hope this will not b
 "greeable to you. It will strengthen our credit, and
 "be used but for your use." Before the appellant
 answer this, a vessel arrived in Jamaica with good
 Hutchison. In answer to which, he immediately
- July 19, — disapproving of the whole transaction, and stating, "
 "not here disavow all concern with the goods you pu
 "or with your business, I should not be doing myse
 "justice and duty necessary for my own protectic
 "security. I therefore, in the strongest terms, roque
 "no such steps may again be taken." Hutchison die
 vent; and the appellant having come to Glasgow, acti
 raised by several parties there, and, among others, by
 spondent, from whom Hutchison had purchased the
 shipped on credit, for the price of the goods, on the supp
 that there was a co-partnership, or joint-adventure be
 them, and that the goods had been purchased on th
 credit of Hutchison and Wilkie. The respondent's
 concluded for £142. 4s. 9d., and also called the rep
 tatives of Hutchison, now dead.

The defence pleaded by the appellant was, that he was not in partnership with Hutchison; that Hutchison had no authority from him to purchase goods on their joint credit; that he had authority only to send out goods for his own account, for which he was to be allowed commission; that the goods in question were sent out to, and received by the appellant, on that footing; that he was given to understand, and did understand, that he was liable to Hutchison alone; and he did accordingly make remittances to Hutchison more than sufficient to extinguish the debt on account of the goods.

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The Lord Ordinary pronounced this interlocutor, "Having considered the mutual memorials for the parties, decerns in terms of the libel; finds expences due, and allows an account thereof to be given in." On representation, the Lord Ordinary adhered. On two several petitions to the Court, the Lords adhered to the interlocutors of the Lord Ordinary.

Feb. 27, 1798.

May 16, 1798.

Jan. 16, 1799.

Nov. 26, —

Feb. 4, 1800.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—There is no colour and no ground for alleging that the appellant and Hutchison were in partnership generally, or that they had a joint concern in the goods, for the value of which this action is brought. They were concerned together, it is true, in certain single adventures, without any regular partnership; but these were completely settled before the purchase of the goods in question. And, previously thereto, the terms on which they were in future to be concerned were distinctly agreed to, and ascertained to be on commission. And it is proved, that the goods sent by the ship "Satisfaction," (including those procured by Hutchison from the respondent Greig), were upon that footing. 2. The appellant cannot be subject to the respondent's demand, without establishing the general abstract proposition, that a foreign merchant, who procures goods from this country, through a correspondent here, to whom he allows a commission, is answerable directly to the persons from whom the correspondent has purchased the goods. A more alarming and untenable proposition than this cannot be maintained. In such a case, the foreign merchant has to do with none but his correspondent, and when he makes remittances, or settles with him, the business is closed. And it is altogether erroneous to consider such a correspondent as an agent or factor, and the

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foreign merchant as a principal. To the foreign merchant the correspondent is the vendor of the goods, and the sole vendor, his profit being the commission. To him it is nothing whether the goods come from the warehouse of the correspondent, or from that of another person to whom the correspondent resorts. To the actual original furnisher, again, the correspondent is the purchaser, and the only purchaser, and from him alone he looks, or can look, for payment. On the latter's bankruptcy, there is no law for holding that the original furnisher is entitled to trace the goods to the ultimate receiver thereof, and to make that receiver liable. Nor could it make any difference, in point of law, though it were proved that the correspondent, when procuring the goods from a third person, said, "These goods are for such a person, and I am only acting on commission;" or though he had asserted falsely, that the foreigner and himself were in partnership, or that the goods were for their joint account, as the appellant cannot be held responsible for this falsehood; but however this may be, in point of fact, it is incontestible that the respondent Greig sold to *Hutchison alone*, and upon his single credit.

Pleaded for the Respondent.—From the letters of correspondence between Hutchison and the appellant, as well as from the accounts of sales rendered by the latter, and from the whole circumstances of the case, it is clear that Hutchison and he were in proper partnership together, although no written contract of copartnership passed between them; and it is an established rule in law, that the transactions of one partner in relation to the company's business, are effectual and binding against all the *socii*. But supposing no proper copartnership to have been constituted, there was at least a joint trade carried on by them, which was not confined to one or two adventures, but extended to a continued series of transactions of great magnitude and importance. The goods furnished by the respondent were on account of that joint trade, and the rule of law is, that he who transacts with one of the adventurers transacts with all, so far as regards furnishings that go to the common stock. If it should, however, be held otherwise, still the appellant is liable, as Hutchison must be presumed to have acted as *præpositus negotiis*, or factor, in this country, for the appellant. It was not Hutchison, therefore, who acquired the property of the goods, but the appellant, whose plea is, that Hutchison had no further right or interest therein, than to the extent of a

certain commission for his trouble. And if the immediate effect of the transaction was to vest the property of the goods in the appellant, in consequence of his having purchased the same through the medium of his factor or agent, it follows that he must be answerable for the price thereof to the seller.

But, however ignorant the appellant may have been of the goods being purchased in the joint names of him and Hutchison, there was no pretext for pleading excuse and ignorance after he was made aware by Hutchison's letter, of the way in which the goods had been purchased. Far less is there any excuse for remitting to Hutchison, after being so apprised, the sum of £500 towards payment thereof. And there is no specialities in this case to authorise a different rule of decision from what was adopted in the cases of Messrs. Thomas and Allan Pollock, Messrs. M'Kenzie, Douglas and Company; Johnstone, Bannatine and Company, and Others.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of in the appeal be reversed, and that the defender be assolizied.

For Appellant, *T. Erskine, Wm. Adam.*

For Respondent, *R. Dundas, Wm. Grant, Thos. W. Baird.*

NOTE—Unreported in the Court of Session.

DAVID and ALEXANDER ALLAN, Merchants in Glasgow,	} <i>Appellants ;</i>
PROVOST and BAILIES of RUTHERGLEN, and other Persons, PROPRIETORS and INHABI- TANTS of the BURGH of RUTHERGLEN,	
	} <i>Respondents.</i>

House of Lords, 18th December 1801.

SERVITUDE OF FOOTPATH—ENCROACHMENT ON IT.—Circumstances in which it was held that the inhabitants of Rutherglen, also the inhabitants of Glasgow, Blantyre, and Hamilton, had the servitude of a footpath from the Glasgow Green, along the banks of the Clyde, to Rutherglen Bridge, acquired by immemorial use and possession; and that the proprietor of the lands on both sides of the footpath was not entitled to erect an arch over the footpath so as to injure it, by rendering the footpath dark and wet below

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the arch, or a low, dark, and dirty passage; but might erect an arch to connect the grounds on both sides, fifteen feet in length and seven feet four inches in height, so as not to produce these injurious effects.

There is a footpath along the banks of the Clyde, leading from Glasgow through the Glasgow Green, up to the Rutherglen Bridge, or burgh of Rutherglen. This has been enjoyed for time immemorial, as a servitude of footpath, by the public at large, among others, by the inhabitants of the burgh of Rutherglen, parishes of Cambuslang, Blantyre, Hamilton, and Kilbride, when going to and returning from the city of Glasgow.

The appellants are owners of a small part of the land on the river side, and this footpath passes through part of their property. In the year 1772, David Allan thought proper to change the direction of this footpath, where it passed through his property. The Magistrates of Rutherglen applied to the Sheriff to have him interdicted, in which, after answers were lodged, the Sheriff pronounced judgment in favour of Mr. Allan, but no farther step was taken until the year 1796, when the appellants proceeded to erect two stone walls of sixty feet in length each, and six feet in height, one on each side of this footpath, and only distant from each other five feet. These walls they were proposing to connect, and had begun to connect, by an arch thrown over the footpath, sixty feet in length, five feet wide, and six feet high, the consequence of which, as was alleged, would have been to injure the footpath materially, by rendering it, below the arch, a low, dark, dirty, and dangerous passage, in the vicinity of a populous city. In these circumstances, the respondents complained to the Sheriff, and craved an interdict, founding on their right of servitude of footpath over the appellant's property, as acquired by immemorial use and possession.

After visiting the subjects, the following judgment was
Sept. 22, 1796. pronounced by the Sheriff:—" Having considered the petition for the Magistrates of Rutherglen, with the answers for David and Alexander Allan, replies, duplies, triplices, and extract, decret in 1772, produced by Messrs. Allans, and having advised with the Sheriff-depute, who viewed the footpath in question, and arch already begun to be erected by Messrs. Allans, finds, That the footpath in question is a natural and necessary communication from Rutherglen Bridge to the Green of Glasgow, and that

"the grounds on both sides of that footpath have been
 "several years ago enclosed by different proprietors, in
 "such a manner as to afford such communication, and that
 "said footpath, for upwards of twenty years at least, has
 "been confessedly used by the public in the same direction
 "and form it was in : Finds, that the arch projected by
 "Messrs. Allans, and already thrown over a part of the foot-
 "path, would, if extended sixty feet, be hurtful to the ser-
 "vitude of the footpath in question, by rendering it dark and
 "wet, and, by exposing the public to other inconveniencies
 "in a long narrow passage, near a populous city : Finds,
 "that by an arch of fifteen feet in length, and of the same
 "height with that now erecting, Messrs. Allans may con-
 "nect their ground lying on each side of the footpath ;
 "and as the Messrs. Allans seem to have no other object in
 "view, by the operation they are carrying on, but to render
 "their property more advantageous and agreeable, by get-
 "ting immediate access to the river Clyde : Finds, That the
 "Messrs. Allans are entitled to use their property in such a
 "manner as will not be prejudicial to, or inconsistent with,
 "the servitude in question, and that they may lawfully erect
 "an arch of the same height with the present, not exceeding
 "fifteen feet in length, which is sufficient to allow carts or
 "common carriages to pass ; and, with this exception and re-
 "servation in favour of Messrs. Allans, continues the inter-
 "dict already pronounced, and decerns accordingly."

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On reclaiming petition, the Sheriff having adhered, an
 advocacy was brought of this judgment, to which was
 superadded a reduction of the sentence of the Sheriff pro-
 nounced in 1772.

The Lord Ordinary, of this date, pronounced this inter-locutor,—Feb. 15, 1798.
 "Conjoins the foresaid process of reduction with
 "the mutual processes of advocacy, and in these advoca-
 "tions, advocates the cause from the Sheriff of Lanarkshire,
 "and in the reduction and declarator, reduces the decreet
 "of the Sheriff under challenge, and finds in terms of the
 "interlocutor of the Sheriff, of date 22d September 1796,
 "complained of in the foresaid advocacy, and decerns and
 "declares."

Both parties represented, and, after visiting the ground,
 the Lord Ordinary adhered. Both parties reclaimed to the July 11, 1798.
 Court; the Lords found that "the side walls under the Dec. 20, —
 "arch in question must be at least seven feet four inches in
 "height from the surface of the gravel upon the road ; and,

1801. "with this addition, adhere to the interlocutor reclaiming against, and refuse the desire of both petitions."

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By a separate interlocutor, the appellants were found liable in £60 expenses.

Against these interlocutors the present appeal brought to the House of Lords.

Mar. 2, 1799. *Pleaded for the Appellants.*—On the merits. The Magistrates of Rutherglen have not produced any evidence that the burgh has right to a servitude of footpath through property of the appellants, and it is a maxim of law that freedom is to be presumed *in dubio* against a claim of servitude, Stair, B. 11th, tit. 45. And it is no answer to say, that the burgh's right was admitted in various passages in the former action, because the passages in these passages were hypothetical statements, made merely in argument where they endeavoured to show that the operations under challenge did not injure the footpath, even supposing it were quite clear that the burgh had the right of servitude claimed. And now, even admitting the existence of the right of servitude claimed, still that would not entitle the burgh to interrupt the appellants' operations, which does not entitle to destroy or materially injure the path; agreeably to the common maxim of law, "That every servitude shall be used as to produce the least possible interference with the enjoyment of property in the servient tenement, Ersk. B. 2, tit. 12; Bank. B. 1, tit. 7, § 3. On the expenses. The Sheriff was not competent to try the question, in regard to the right of the footpath, that being only competent by declarator before the Court of Session. Nor was he in the question of the footpath, because it had been finally disposed of by an extra decree in his own court, which foreclosed the same question from being reviewed there. And this incompetency of the whole procedure before the Sheriff seems admitted by the Magistrates, by their bringing an action of reduction and declarator; and this action contained three conclusions in all of which they have been unsuccessful. They pray that the path should be laid open, as it went originally to the top of the bank. They demanded that the towing-path on the side of the river should be left clear; and, first, they demanded a series of damages, in all of which they have been unsuccessful. On these grounds, the Court ought not to have awarded expenses.

Pleaded for the Respondents.—The footpath in question, part of which, to the extent of 200 yards, passes through

the appellants' grounds, has been enjoyed as a footpath from Glasgow to the adjacent country, as far back as the memory of man, and has been always used by the inhabitants and proprietors of houses and property adjoining, such as the respondents, in going to and returning from the city of Glasgow. Had not the existence of this servitude been acknowledged, a complete proof could easily have been adduced; but the records of the Sheriff Court and Court of Session instruct the appellants' acknowledgment of the existence of the servitude in question. They, accordingly, proceeding on its validity, have argued that such a servitude must, by law, be as gently used as possible, which necessarily assumes the existence and validity of such servitude. They made a new footpath in 1772, when they altered the direction of the old, which they would not have done had they been entitled to shut it up altogether; and even in 1796 they did not venture to shut up the footpath, but only attempted to throw an arch over it. It being clear, therefore, that there is a servitude of a footpath on the appellants' grounds, it is maintained that the appellants cannot injure it. And if these operations render the footpath much less commodious than before, and more dangerous as a passage, as it undoubtedly would be, by an arch sixty or forty feet in length through, and only five feet wide in span, being thrown over it, the erection cannot be allowed. By such erection, the footpath would be both darkened and rendered wet and dirty, and, in the end, become a place of common nuisance, independent altogether of its being a covert to enable pickpockets and footpads to molest and attack persons passing that way,—a circumstance certainly not the least material, when it is considered the footpath serves as a passage, or line of communication, between the town of Glasgow and a considerable part of the adjacent country.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *William Adam, Geo. Cranstoun.*

For Respondents, *Wm. Alexander, Robert Montgomery.*

NOTE.—Unreported in the Court of Session.

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1802.

JOHNSTONE, &c. v. STOTTS, &c.	PETER JOHNSTONE, Esq., and Others, Trustees of JAMES MURRAY, Esq., of Broughton, de- ceased, and JOHN THOMSON, Writer in Kirkcudbright, and THOMAS BUSHBY, Col- lector of Customs there, Tacksmen of the Fishings of Tongland, in the River Dee,	}	Appellants
	WATSON and EBENEZER STOTT, Esquires of Kelton, and their Commissioners,	}	Respondents

House of Lords, 18th Feb. 1802.

SALMON FISHING—CRUIVES—PRESCRIPTIVE POSSESSION.—(1.) *Cir-*
cumstances in which a new mode of fishing, by means of doachs,
was construed to fall within the description of a cruive fishing,
and subject to the rules and regulations of the statutes regulating
that mode of fishing, and therefore, that certain blind eyes, and
other artificial obstructions used, must be removed as illegal. (2.)
That this right of cruive fishing was established, although the re-
spondents had produced no title to the salmon fishing, but only a
charter from the crown, conveying the lands cum piscationibus,
followed by immemorial usage of such fishing. Affirmed in the
House of Lords, excepting as to part of the interlocutor which
was remitted.

This was a question regarding the mode of fishing salmon claimed by the appellants, as proprietor and lessees respectively of the lands of Tongland, on the river Dee.

The barony of Tongland, with the salmon fishings in the river Dee, had belonged anciently to the abbots of Tongland, and had, at the time of the Reformation, come into the possession of the Viscounts Kenmore.

It was alleged to be in evidence that, in the middle of the seventeenth century, these salmon fishings were carried on by what, in the language of the country, are called Doachs, which are certain engines contrived to suit the peculiar nature of the bed of the river. This was proved by an old valuation of the fishings in 1642; and a lease granted of them by Viscount Kenmore in 1688, whereby the Viscount became bound to make the doachs and carrachs sufficient against the tenant's entry, and to keep the doachs sufficient during the period of the lease.

Viscount Kenmore, in 1726, was attainted of high treason, after he had divested himself of his whole estate, by an absolute conveyance to Henry Bothwell of Glencorse. Upon this conveyance, Mr. Bothwell obtained a charter from the

crown, comprehending the barony of Tongland, "with the salmon fishings in the river Dee, and other rivers, as used and wont, and was infeft." 1802.

Henry Bothwell, in 1731, conveyed these estates to Mary, Viscountess Kenmore, who obtained charter from the crown, in which the fishings were thus described, "Cum piscatione salmonum aliorumque piscium in aqua de Dee et alius fluvii solit et assuet." Upon this charter she was infeft, and the infeftment recorded, of these dates. JOHNSTONE, &c. v. STOTTIS, &c. 1731. 1735.

The subsequent conveyances were all in the same terms. Oct. 8, and Dec. 1, 1735.

By a minute of sale, dated 1744, Alexander Murray of Broughton acquired right to the Mains of Tongland, and to certain other lands, and to "all and whole the fishings of Tongland and other fishings on the river Dee, as used and wont;" and upon his death a regular disposition, in implement of the minute of sale, was granted to his son, the late James Murray, in whose right the appellants now stand, conveying this subject in the same form of words, upon which disposition Mr. Murray was infeft. 1744.]

May 27, 1754.

The respondents were the proprietors of the lands of Kelton, with the salmon fishings belonging to these lands, also in the river Dee, about two miles further up the river; and they now objected to the mode of fishing practised by the appellants as being illegal. They alleged that, in place of cruive boxes constructed according to the regulations pointed out by the acts of parliament, the proprietors of the Tongland fishings employed a kind of machinery called doachs, somewhat resembling cruives, but differing in various respects from them, particularly in the distance and formation of the spars, and calculated for no other purpose than to prevent the salmon from getting up the river. Besides these, it was alleged they employed other devices to enhance the value of their fishings. They fished in forbidden time; and they disregarded the law which requires that all cruives should be kept open from Saturday to Wednesday (Saturday's slap); and they thought proper to obstruct the whole passages between the rocks, partly with barricades or machinery called blind eyes, and partly with stones and other materials, bound together with planks of wood, which they called foot-gangs. By these means the upper or higher heritors found their fishings, year after year, become less and less; which compelled the respondents to present a petition to the Sheriff, complaining of the illegality of the mode of fishing, and praying that the machinery be re-

Aug. 1794.

1802. moved, and the appellants prohibited from fishing during forbidden time. This was followed by an action of declarator before the Court of Session, in which the respondent concluded, 1st, That it should be found, either that **Johnstone, &c.** Murray had no right of cruives in the river, or, 2dly, That he is bound "to have the structure of the place or places where the salmon are caught conform to the law of cruive fishing, and observe what else is prescribed by law with regard to salmon fishing."

In support of this action, the respondents produced this title, 1st, Special retour of William Earl of Nithsdale, as heir to his father: "In tota et integra salmonum piscatione sua per Aquam de Dee aliasque piscationes quascunque ab antiquo ad Castrum de Threaves spectan. quarum hæreditarii custodes ejusdem quovis tempore præterito in possessione fuerunt." 2d. Infeftment on the said retour. 3d. Deed of conveyance by the Earl to Robert Johnstone, in whose place the respondents now stand, dated 1703, of the salmon fishings on the river Dee, in the above words of the retour; and, 4th. A charter from the crown in favour of Johnstone, in which the salmon fishing is omitted, the grant being generally of the fishing in the river of Dee, and other fishings belonging to the Castle of Threaves.

The appellants contended that this title did not confer a right of salmon fishing, and that this right could not be acquired by prescription, or from general words, such fishings being *inter regalia*, and to be acquired only by a subject under an express grant from the crown.

The Lord Ordinary allowed a proof to both parties, which was chiefly directed to the mode of fishing, and the machinery used therein, so as to establish whether they were of a legal or illegal nature; the appellants endeavouring, on their part, to prove that they had a right of doach fishing in the river, which was entirely different from a cruive fishing.

The Lord Ordinary reported the case, with the proof, to the Court; and the Court, of this date, pronounced this judgment:—"Sustain the title of the pursuers to insist in this action; find that the defender, James Murray, Esq., has right to a cruive fishing in the river Dee, at the places marked in the plan, Meikle Doach, Priory Doach, and Little Doach; but find that the cruives or doachs must be regulated in terms of the laws regarding cruive fishings; and that the blind eyes, and other artificial obstructions or barricades, to interrupt the run of the fish in the river,

"within the bounds of the defenders' fishings, must be removed as illegal; and remit to this week's Ordinary on the Bills, to ascertain the particular regulations that ought to be observed in the said cruives; and decern against the defenders to observe the same accordingly; finds the said James Murray, defender, liable in the full expense of extract, but in no other expense, and decern."

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Against this interlocutor Mr. Murray petitioned, but the Court adhered.

Dec. 6, 1798.

The cause having been remitted to the Lord Ordinary, his Lordship allowed Mr. Murray to proceed in erecting his cruives and cruive dykes, according to the regulations "proposed by the pursuers, in so far as they are agreed in the minute on his part, which appears to him to admit every thing that can be legally claimed by the pursuers."

A petition was presented to the Court, complaining of those articles which the Lord Ordinary had rejected as unnecessary and illegal, and praying that they should be adopted; and, in consequence, the Court remitted to Mr. Craigie to report.

After visiting the fishings and reporting, the Court pronounced this interlocutor:—"The Lords having resumed con-

Dec. 13, 1799.

sideration of this petition, with the answers for Mr. Murray of Broughton and his trustees, and report of the Sheriff-depute of Dumfries, in consequence of the remit to him from the Court, and advised the cause; find the defender is bound to place the cruive boxes to which he has been found entitled, at the places marked on the plan, and known by the name of Meikle Doach, Priory Doach, and Little Doach; and find it at present unnecessary to determine whether the defender is at liberty to shift all or any of these doachs, or cruive boxes, in case of any alteration on the state of the river; find that the rungs or spars of the cruive boxes must be placed at a distance not less than three inches, and must be made of an oval shape, with the edges rounded off; find that the form and construction of the cruive dykes and boxes, and the construction and position of the inscales are to be so formed, constructed, and fixed, as to answer the purposes of the cruive fishery, and agreeable to the practice of those fishings in the north of Scotland, where the cruives have been regulated according to law; find that the spaces between the rocks, from which the blind eyes are to be removed, are to be filled up with proper materials, formed

1802. "and constructed like other cruive dykes; find that
 "Saturday's slap must be observed in all the cruives,
 JOHNSTONE, "cording to law; and that the inscales during that t
 &c. "must be taken up and removed; or where that cannot
 v. "done, from the state of the river, that the same shall
 STOTTS, &c. "drawn back and properly fixed, so as to leave a free
 "sage up the river for the salmon; find the pursuers
 "their successors, having right to the salmon fishings in
 "upper part of the river, are to have the liberty, upon
 "vious notice, to view the cruives and cruive dyke, that t
 "may know if the regulations now established are prop
 "observed; supersede determining upon the demand
 "the pursuers to annex a penalty to the breach of any
 "these regulations; reserving to the parties to apply
 "summary complaint to the Court, in case of any interr
 "tion to the rights and privileges to which they have
 "spectively been found entitled; and decern and decl
 "accordingly." The appellants reclaimed by petition
 Jan. 17, 1800. against part of this interlocutor; but the Court adhered.

Against this interlocutor the present appeal was broug
 to the House of Lords.

Pleaded for the Appellants.—The respondents have
 produced a title to a salmon fishing in the river, and, co
 sequently, cannot carry on the present action. It is alleg
 by the respondents, that the proprietors of Kelton ha
 been in the uniform practice of taking salmon in this riv
 and this practice, coupled with the clause in their chart
cum piscationibus, would constitute a right of salmon fi
 shings, but the grant to the respondents' predecessors is
 essentially defective in not mentioning *salmon* fishings; th
 allege that the word *salmonum* must have been omitt
 by accident in the charter to Johnstone, because it w
 in Lord Nithsdale's retour; but if such an allegation
 to be listened to, it is much more reasonable to conclu
 that it was purposely omitted, the officers of the crown
 being satisfied with the title; and if their right is rested
 prescription, it must be limited by that belonging to t
 appellants at the time the course of prescription began
 run. At that period the proprietors of Tongland were
 the undisputed possession of a doach fishing in the inferi
 part of the stream, which having continued ever since,
 not only secure from challenge, but, on the well kno
 principle of law, *quod tantum prescriptum quantum poss
 sum*, must have the effect of qualifying the right acquir
 by the respondents in consequence of the lapse of this [

riod. 2. Supposing the respondents entitled to enter on the merits of the cause, the right and property of the appellants is one essentially different from that of a cruive fishing, and to which the provisions contained in the acts of the Scottish Legislature relating to this subject do not apply. The jurisprudence of Scotland favours the law of prescription, and extends it to all rights which mankind enjoy; and hence every right which has been exercised without challenge for a certain period, is held to be sacred in all time coming. When a right of property is once established, it may be exercised in the most unlimited manner: and if uniform possession is made out, it must be permitted to continue, because more essential injury would arise from overturning what has been established, than from allowing the exercise of the right complained of. Nor is the plea maintained by the appellants foreclosed by the statutes applicable to salmon fishing. Of these, the principal object appears to have been, to subject those salmon fishings which were carried on by means of cruives and yairs, to certain regulations; with which view they provide, that all cruives set in water, where the sea ebbs and flows, be destroyed entirely, and that cruives in fresh water observe the Saturday's slap, and certain other regulations well known. All these acts most particularly mention the engine meant to be regulated, leaving those sorts of salmon fishing, not specially enumerated, to be governed by those rules, to which, either from their original constitution, or inveterate practice, they may have been made liable. It is not declared in any of the acts, that salmon fishings of a species separate and distinct from cruive fishing, and which some natural circumstance in the bed of the river where they exist may have rendered necessary, shall be put down, or at least shall be managed as the law requires in the case of cruives and yairs. The statutes therefore requiring the observance of the Saturday's slap, and the hecks to be of a particular wideness, apply to a cruive fishing only, and ought not to be extended to a fishing like that of Tongland, which is entirely different in its nature, has been sanctioned by uniform possession, and has yielded a certain revenue to the crown for upwards of a century past. The case of Mackenzie, decided in 1750, is direct in point to the present. On the principles which induced the Court, in that case, to find that the bulwark there in question could not be taken away, in respect of the defender's title, and the immemorial possession had in virtue thereof, the appellants submit that they

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have a right to preserve their fishings as they have been immemorially exercised. 3. The Court, assuming that this is a cruive fishing, subject to the statutory regulation directed, by the interlocutor of 28th June 1798, that the blind eyes and other artificial obstructions and barricades interrupting the run of the fish, within the bounds of the appellants' fishings, must be removed as illegal; and again by the interlocutor of 13th Dec. 1799, the Court finds that the spaces between the rocks from which blind eyes are to be removed, are to be filled up with proper materials, for and constructed like other cruive dykes. The result of this is, that the appellants must remove the ancient barricades, and substitute another mode. The inference, it would suppose to be, that there is a known established form of cruive dykes; but the appellants know of none. A cruive dyke, they conceive to be something more than a wall or mound across a stream, which any person having a right to a cruive fishing may erect in such form, and with such materials as he thinks proper, and in rebuilding or repairing, no person can find fault, if the new operations are not more injurious to the superior heritors, by preventing the run of the fish, than the old works were. It is undeniable, that the person entitled to make the barricade, can never be obliged to make it less effectual than before. Supposing, then, that the fishing in question is a cruive fishing, where is the law which prescribes the form in which the barricade, dyke, or mound must be constructed? Where is the statute saying that what are called blind eyes shall not form the barricade? It is clear that the blind eyes are more effectual to stop the fish than a dyke or wall, because the blind eyes admit a passage to the water downward without suffering the fish to go upwards, whereas a dyke or wall must, in floods, be overflowed, and the fish get over it. The appellants have, for time immemorial, possessed this advantage, which is part now of their property as much as the fishing generally, unless there be some law ascertaining the form and materials of a cruive dyke across a river. At the appellants contend there are none such.

Pleaded for the Respondents.—1. The Court, in finding that the appellants must alter their former mode of fishing and regulate their doachs or cruives agreeably to the law regarding cruive fishings, have done no more than give effect to an established principle, both of the common and statute law of Scotland, that all obstructions in the channel

of a river (other than what are expressly recognised by the law, as in the case of cruives), are illegal, and must be removed. 2. No length of possession or alleged immemorial usage, can sanction the breach of a public law, or be set up as a title to found prescription. In this view, the appellants cannot be allowed to avail themselves of any antecedent usage, to the effect of claiming the exercise of the same illegal mode of fishing in time coming. 3. The appellants, however, have not shown that the works at Tongland have been all along the same as at commencement of the process. On the contrary, the respondents have shown from the evidence, that considerable alterations have of late years been made upon them. That the works at Tongland, as originally complained of, were illegal obstructions in the channel, cannot admit of dispute. The plans, measurements and description of the works given by the witnesses, demonstrate this in the clearest manner, as well as show the great prejudice and damage thereby occasioned to the respondents' fishing. The appellants have little reason to complain of the judgment of the Court allowing them the exercise of a cruive fishing, when it is considered that they have no express grant of cruives by their charters; and that any possession held by them seems to have been of a different kind from that of cruives; indeed, contrary to the established law. The interlocutor of 28th June 1798, is therefore right, declaring that their fishings must be regulated in terms of the laws respecting cruive fishing; and the subsequent interlocutors, fixing the particular regulations that are to be observed by the appellants, ought therefore to be affirmed.

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After hearing counsel,

LORD CHANCELLOR ELDON said,—

“ My Lords,

“ Your Lordships will recollect that this cause was heard at the bar before the recess. It is an appeal against three interlocutors of the Court of Session, in an action brought by the respondents, the general prayer of which was, to have certain fishings regulated conformably to the rules of law for cruive fishing, and that the appellants should be enjoined to observe, what was otherwise prescribed by law, in regard to salmon fishings.

“ The first interlocutor, 28th June 1798, is in these words, ‘ Sustain the title of the pursuers to insist in the action,’ &c. Against this interlocutor, a petition was presented, and afterwards, by the indulgence of the Court, a full additional petition; and, in the course of further proceedings, it became necessary to settle before the Lord

1802. Ordinary the regulations of the cruive fishing, to which the
 _____ lants had been found entitled. I shall not take up your time
 JOHNSTONE, description of this mode of fishing, as it was fully explained
 &c. bar, which must be in your Lordships' recollection.
 v
 STOTTS, &c. " After some further proceedings, the Court at last, on the
 December 1799, pronounced an interlocutor to the following :
 ' The Court having resumed consideration of this petition
 (The interlocutor was here read at length.) Your Lordship
 that by this interlocutor, it is stated that no alteration having
 place in the state of the river, the Court had found it unnecess
 determine, whether it would be prejudicial to the appellants,
 event of the *locus in quo* the fishings were situated changing,
 shifting of the course of the river, if they were not entitled to
 the cruive boxes from the three places mentioned ; and, that the
 superseded determining as to the penalty, on the breach of any
 regulations which they had, by this interlocutor, directed to
 served ; because, as I suppose, this related to what is termed
nobile officium of the Court, a species of its function little kno
 understood in this country.

" One branch of this interlocutor was submitted by the app
 to review, namely, in so far as it found that the inscales must
 moved during the Saturday's slap, or, if that could not be done
 they should be drawn back and properly fixed :—And their p
 against this interlocutor being refused without answers, they br
 the cause here by appeal.

" The pleadings were opened on their part, by Mr. Solicitor
 neral, who, in a very distinct and luminous manner, stated bo
 facts and the law of the case. It did not escape me, that he
 difficulty in reconciling his ideas, as an English lawyer, to the
 in which this case had been treated by the Court ; a difficulty
 has often occurred to myself on similar occasions. I allude t
 large discretion used by the Court of Session in regulating s
 fishings. I do not rest upon this observation, as one upon wh
 would be fit to ask your Lordships to do anything when de
 a question on appeal from Scotland ; it appears to form part o
 law of that country, and is sanctioned by the mode of adminis
 it, which has been of long standing, and by length of time ad
 I need not remind your Lordships that, in considering such m
 we sit here as a Scotch Court—a Court of Session.

" The first objection offered by the appellants was, that the
 suers had not a sufficient title on which to maintain the action
 they hardly attempted to argue this, and distinctly abandoned

" Secondly, They contended, that this was not a cruive fishing
 therefore not subject to the laws for regulating cruives ;—but,
 this, they did not lay much stress. Indeed, I am not sure if thi
 strictly be said to be a cruive fishing ; and I think it may be de
 upon an examination of the facts in the case, that the Cour
 given a more liberal interpretation to the right of fishing than

was originally enjoyed. It originally appears to have been a species of cruive fishing between rock and rock; and I see great reason to doubt if the rest of the space was at first quite filled up. The Court seems to have considered this to be a cruive fishing, where the cruive dyke was partly formed by nature, and where not so formed, that the parties had a right to complete it in a legal manner. But I am not at present to submit to your Lordships any proposition for bringing into doubt, whether this be a cruive fishing or not.

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"The next question is, Whether the Court has, in this particular case, applied such regulations as are to be given to cruives in general? On the consideration I have given to the subject, I have felt my mind much enlightened by communication with a noble and learned Lord, long and deeply skilled in questions of this sort.—And, on the Lord Thurbest consideration which I have been able to give it, it appears to me that the regulations, in all the cases where they are complained of by the appellants, are either such as are justified by the precedents of former adjudged cases, or lenient in themselves towards the complainants.

"The first objection to the regulations was, that the rungs or spars of the cruiver, which had been properly directed to be three inches asunder, and in a perpendicular direction, had been also ordered to be of an *oval shape*, with the edges rounded off;—and it was contended that the Court had no authority to add this part of the regulation, which was not contained in the Scotch statute. It will be recollected that the reason originally given by the Scotch Parliament for directing the spars to be of a certain distance asunder, was, that fish of a certain size might pass through,—that the fry of all fishes might escape. It will not be denied, that if the Court are authorized to do what they have done, their regulation will tend greatly to facilitate the passage and escape of the fry. It is no doubt true, that if the spars were of a cubical shape, the fish would have more difficulty in passing than if they were an oval one;—if the spars were jagging, they would soon tire of their attempt to pass through them.

"An English lawyer would think himself entitled to contend with pertinacity, that if the spars were of the due statutory distance, it was not competent to regulate their form. But the Court has thought itself at liberty to follow up the spirit of the law, by the regulation in this case. This is indeed a proceeding which is unknown to the lawyers in this country; and it is no small comfort to me, that I am tied down in cases, where I have to decide elsewhere, to the strict letter of the law. That a greater latitude is allowed to the Courts in Scotland, cannot be denied. A precedent in point for this, was produced by Mr. Adams at the bar, where it had been directed by the Court, and affirmed by this House, that the cruive boxes should be placed in a certain position, and without *knobs* on the inscales. In that case, the object of the regulation was the same as in the present; and it therefore appears to me, (in which opinion the noble Lord already alluded to, concurs with me,) that this part of the interlocutor is well founded.

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 Scott of Brotherton,
 July 4, 1768.
 Mor. 14293.

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"The next branch of the interlocutor complained of is, where it finds that the cruive dykes and boxes are to be so formed, constructed, and fixed, as to answer the purposes of a cruive fishery, and agreeable to the practice of these fishings in the north of Scotland, where the cruives have been regulated according to law. It is here that my only difficulty with regard to the interlocutors in the present case lies; and I doubt much if it does not contain a dangerous degree of looseness. Your Lordships will see, that it does not give the suitor the rule with sufficient distinctness, according to which he is to form his cruive boxes or dykes, but refers him to the practice in other cases. The question left undecided is, What regulations does the law attach to this particular point? I have great doubt, if this reference to the practice in the north of Scotland can be held to define this. It may be asked, what particular fishings in the north of Scotland are here alluded to; and, can regulations similar to those ordered in any former decided case, be adopted here?"

"The fishing here differs considerably from any ordinary case of cruive fishing. In general, the dyke is an artificial bulwark, stretching quite across the river from side to side, in which the cruive boxes are placed; but here there is no such continued building, but a chain of obstructions, partly connected by rocks and by artificial erections, *sparsim*, and at intervals. It may be impossible, therefore, to make this like any dyke in the north of Scotland, if there be fishing there of a species distinctly similar.

"It still remains a difficulty in my mind, in what form to state an alteration in this part of the interlocutor. It occurred at first in a communication with the noble person I have alluded to, that it might be done by leaving out part of it, and merely directing that the cruive dykes and boxes should be regulated according to law. But doubts were entertained, whether cruive fishings have been so regulated, as would apply to this particular case? Another course occurred, that this matter should be sent back to Court, with a direction to state what particular regulations were here alluded to. A third mode has occurred, since I had communication with the noble Lord on this subject, which is the reason that I shall request that the consideration of this point be put off for a short space; and it occurs to me, that this may be the way of getting rid of the difficulty most respectful to the Court of Session;—to send the parties back upon this point, with a direction to the Court to enquire what are the most wholesome regulations to be applied in the present case.

"The interlocutor then proceeds, with a direction that the blind eyes are to be removed, and filled up with proper materials, formed and constructed like other cruive dykes. It appears to me that this part of the judgment is in favour of the appellants. It is impossible not to see, from the evidence in this cause, that, in the recollection of witnesses, great alterations had been made on the state of the obstructions from time to time. If the appellants do not choose to submit to what is here ordered, they must do away those alterations stated

by the witnesses to have taken place, leaving in some parts an unobstructed passage, at least only obstructed by the rocks. The Court, in this branch of the interlocutor, has proceeded upon the idea that the appellants were entitled to a cruive fishing in those places where they had used cruives immemorially, (I use this word in the sense it is taken in Scotland, not as we apply it in this country,) and that, of consequence, where there is a doach, there ought to be a cruive dyke.

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“The next part of the interlocutor relates to the Saturday’s slap, with regard to which no possible complaint can be made. The law of Scotland admits of more departure from the letter of its statutes than we have any idea of in this country. We have seen, that the courts of that country superadded provisions to their statutes; and they also do not scruple to enforce their statutes at times, as gently as the statutes admit of being interpreted.

“We see here too, that a Scotch statute may be lost by *desuetude*, as it is termed:—that the ancient statutory regulation of a mid stream in all cruive dykes is entirely gone, and no longer remaining part of the law. The English lawyer feels himself much at a loss here; he cannot conceive at what period of time a statute can be held as commencing to grow into *desuetude*, nor when it can be held to be totally worn out. All he can do is, to submit to what great authorities have declared the law of Scotland to be.

“In cruive fishings, however, nothing is more clear than that the Saturday’s slap is to be observed. The appellants, therefore, on this part of the interlocutor, must take their choice, either to observe this regulation, as it is laid down in the statute, or to take this modification of it; either to take out the inscales altogether, or keep them fixed back, as the Court has here directed. This is a modification which the courts of this country could not grant. The appellants allege, that it is difficult and dangerous at times to do this. To which I answer, they must then observe the slap according to law. You will observe that the Court has reserved a liberty to apply to it in case of any interruption to the rights of the parties, as contained in the interlocutors. If there be at any time an impossibility to observe the directions there given, the Court may excuse on that account. Or if, on the other hand, a vexatious use be made of the indulgence here granted to the appellants, it may then become the duty of the Court to consider if the strict letter of the law should not be enforced, and the *bona fide* observance of the Saturday’s slap not disappointed, by the use of those easements.

“Upon the whole, though I do not feel myself prepared, or at liberty to submit any distinct proposition to your Lordships on the point, relative to which I have stated my only difficulty lay, I trust your Lordships will excuse me for having gone thus at large into the points of the cause, which I have done to set the minds of parties at ease, as much as lies in me, upon the great points in the cause.

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I do not feel it to be my duty to offer any proposition, for an alteration of any other part of the decree, than that which I have already stated to be in my opinion too loosely framed for the ends of effectual justice between the parties."

On his Lordship's motion, the further consideration of the cause was adjourned till Wednesday next.

On that day his Lordship came, prepared with, and move the following judgment :

Ordered and adjudged that the interlocutor of the 13th Dec. 1799, complained of in the appeal, be varied, by leaving out after the words (are to be), the words (s formed, constructed, and fixed, as to answer the purposes of cruiue fishery, and agreeable to the practice of these fishings in the north of Scotland, where the cruiue have been.) And it is further ordered, that the cause be remitted back to the Court of Session in Scotland to review this part of the said interlocutor, for the purpose of giving, and to give, precise directions to the parties for regulating the form and construction of the cruiue dykes and boxes, and the construction and position of the inscales according to law. And it is further ordered and adjudged, that with the above variation to the said interlocutor, the several interlocutors be, and the same are hereby affirmed.

For the Appellants, *J. B. Maitland, Wm. Erskine.*

For the Respondents, *Wm. Grant, Wm. Adam, J. Burnett.*

NOTE.—This case is not reported in the Court of Session.

CHARLES STEWART, Writer to the Signet, *Appellant* ;
 ANDREW MILLER, Depute Clerk to the Bills, *Respondent.*

House of Lords, 25th Feb. 1802.

SALE OF AN OFFICE—PACTUM ILLICITUM.—Circumstances in which a party was appointed a Depute Clerk of the Bills, by an agreement which amounted to a sale of an office. The party was to pay £2700 one half in cash, the other by a right to two-fifths of the fees. Thereafter new fees were appointed to be exacted, increasing materially the returns of the office. Held by the Court of Session, that the agreement was good as to the old fees, but not as to the additional or new fees. The party acquiesced in this judgment, but his opponent took the case, as to the new fees, to the

House of Lords. Held in the House of Lords, that as the respondent had not appealed against the interlocutor, sustaining the legality of the agreement, no judgment could be pronounced on that question ; but strong opinion indicated that such sales were illegal ; and the interlocutors of the Court below were affirmed, without prejudice to that question.

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The office of Principal Clerk of the Bills is an appointment of the Crown. Originally they were required to attend personally, and perform the whole duties of the office ; but the business having increased, it ultimately came to be performed by Deputes, or Assistants appointed by the Principal Clerks ; their commission entitling them "*cum plena potestate idem per semet-ipsam deputatos suos seu servos per illum nominandos, pro quibus respondebitur, gerendi et exercendi, et omnibus libertatibus privilegiis et immunitatibus, proficiis, casualitatibus, emolumentis, commodis, et omnibus aliis utilitatibus quæ pertinere seu pertinere potuerunt ad ullum priorem clericum dictæ tabulæ petitionum fruendi, vel quæ per ullum priorem usum seu ad idem pertinere,*" &c.

It had been for some time the practice of the Principal Clerks of the Bills, when filling up a vacancy in the Depute Clerk's office, to sell the office, or to agree to appoint him on payment of a certain sum.

On the death of William Finlayson, Depute Clerk of the Bills, in 1795, application was made to Sir Robert Anstruther, through his commissioner, the appellant, and Mr. Smith, the Principal Clerks, on behalf of the respondent Miller ; and after considering his qualifications and fitness, which were highly recommended, and which, to the Principal Clerks, seemed satisfactory, an agreement was entered into, by which it was arranged that the respondent was to pay £2700 as the purchase price of the office. But as he was devoid of the means of paying this sum, and as it was of importance to the public that his services should be procured, he being the only qualified person among all the applicants for the office, the appellant volunteered to advance one half of the price for the respondent, on condition that *he, his heirs and assignees*, should become partners in the office, and receive two-fifth parts of the whole Depute Clerk's fees, free of all risk and trouble, while the respondent, who was to advance the other half of the price, and to do the whole duty, as well as undertake the whole risk and responsibility, was only to have three-fifth parts of the fees.

1802. Accordingly the respondent, in consideration of the appellant's paying one-half of the said price, agreed to pay him, his heirs and assignees, two-fifths of the fees; and further bound himself, in the event of his resigning the office, or failing to implement the obligation, "to content and pay to the said Charles Stewart and his foresaids, one-half of whatever sum I may receive for said office on my resignation; or in the option of the said Charles Stewart and his foresaids, at least the sum of £1360 sterling, (being one half of the purchase money), and that on the death of any such resignation, or my failing to implement the present obligation, with the legal interest, &c."

Hitherto, the annual income of the fees of the Deputy Clerk had amounted to £500 per annum. The agreement was gone into by all parties upon the distinct understanding that the fees yielded this sum annually. But, soon after the respondent's entrance into office, by various causes, among others, the operation of the small debt act, these did not yield one-half the amount; and the consequence was looking to what he had to pay to the appellant, he was quite unable to meet demands. In these circumstances, the

Mar. 10, 1798. appellant applied for relief to the Court; who, of this date, passed an Act of Sederunt, authorising him to charge certain new fees, with this special clause, that they should be applied to "*his own use alone.*" The present question arises from an attempt of the appellant, under the above agreement, to claim right to two-fifths of the new fees so allowed by the Court, which obliged the respondent to complain to the Court. Informations were ordered; and another point between the same parties was brought up by suspension of charge upon the agreement.

Jan. 17, 1800. The Court ultimately found, that the agreement to pay Feb. 11, — the appellant two-fifths of the old fees, was binding on the respondent; but that the appellant had no right or title to demand payment of two-fifths of the new fees.

The respondent acquiesced in these interlocutors; and the question, therefore, as to the legality of this agreement was not carried further; but against these the appellant brought the present appeal, in so far as they found that he had no right to the two-fifths of the *new fees* attached to the office subsequent to the date of the agreement.

Pleaded for the Appellant.—The contract entered into between the appellant and respondent, of which full implement, according to the comprehensive and general terms thereof, is now demanded by the appellant, is a lawful contract.

tract, sanctioned by precedent, and entitled on principle to be supported. The terms and import of this contract are perfectly clear, and do not admit of dispute. It cannot be denied that it gives the appellant right to two-fifths of the new or additional fees payable in the Bill Chamber, as well as two-fifths of the old fees; because the agreement, in its terms, has general reference to all fees exigible in the Bill Chamber whatever. And it would be an unjust interpretation of the agreement, to hold that he was to take the risk of a material diminution of these fees, but not to derive any benefit from an increase or new set of fees, specially imposed on account of such diminution. The new fees were expressly imposed on account of a great diminution of these fees, by the small debt and other acts; and common justice demands, especially where it is manifest that these new fees are in fact a consolidation of the old fees, or come in place of such as were done away with, that he should be entitled to two-fifths of these also, in terms of the agreement.

Pleaded by the Respondent.—By the express terms of the Acts of Sederunt, the fees thereby granted are appropriated to the respondent's own use alone, so as to exclude the interference of any other person. Could any doubt have ever been entertained upon the words of those acts, with regard to the intention of the Court in passing them, none can now remain, their Lordships having unanimously declared, by two consecutive interlocutors, that they had in view the hardship of the respondent's situation, and that the new fees were intended for the respondent alone. Besides, part of the new fees in question are for the performance of duty which the respondent was not bound to perform, under the commission from the Principal Clerks of the Bills, and therefore were fees which, at the time of the agreement, could not be in the contemplation of the parties. That the Court, in granting these new fees, had power to limit the exaction to a particular person, is beyond dispute.

After hearing counsel,

LORD CHANCELLOR ELDON said,—

“ My Lords,

“ The question here has been agitated at great length, and with much ability. It involves questions of the highest importance. Some of them, after anxious consideration, I have so far altered my original opinion on, as not to deliver any opinion on them.

“ The case originated in a certain obligation, executed by the respondent when he was appointed Depute Clerk of the Bills. It ap-

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pears that the Clerks of the Bills were at one period named by the Lord Clerk Register; afterwards by the Principal Clerks of Session and of the Bills, who were appointed by the Crown. The Deputy Clerks of the Bills were then appointed by the Principal Clerks of the Bills.

"I do not find that the office was originally served by principal and deputy, but by themselves and servants, on fees demandable by the Principal Clerks—the servants receiving reasonable remuneration for their services, paid from part of the fees.

"No doubt, in process of time, the principal took on himself to appoint a deputy—an office now held for life—with distinct fees payable to him and the principal. But how this alteration was effected, whether by Act of Sederunt, Acts of Parliament, or by sufferance, is not clearly shown.

Ante Vol. II. p. 205. "As to the merits of this cause, you must consider the principal and deputy entitled to distinct fees. This seems undeniable, from the representations in the case of Inglis and Waddell, and in this case brought up to your Lordships. It also appears, that these have frequently been made the subject of traffic, and bargain, and sale, a point of fact. I shall notice this when I come to state the point of law; meantime, there is nothing in the Court's judgment declaring that they *ought* to be sold. I shall afterwards propose an interlocutor for declaring, that this House does not decern so. The ends of justice will be answered, if your Lordships' judgment should express that your Lordships give no opinion as to this. I do not think it wholesome that I should express more.

"The office began with Sir George Mackenzie, Sir Robert Anstruther, and Thomas Smith. The appellant states, in his case, that Miller, who seems a meritorious officer, was proposed for the office of Deputy Clerk of the Bills, and, by an arrangement, which amounts to a sale of the office, he was preferred.

"It is a question, whether sales of offices are legal.

"The later decisions in this country have certainly gone this length, that where (I particularly allude to a judgment very ill reported, but most ably given, by a noble and learned Lord, whose assistance your Lordships have received so frequently in this House I mean Lord Thurlow, when he held this principle, as a principle which probably governed his conscience as a judge) his Majesty empowered an officer, for the benefit of the public, to recommend a person to an office, not merely an office in the administration of justice, but an office in a much less degree affecting the public interest, that the law supposed the Crown to repose this trust in him, that he would appoint a person worthy to fill that place; that the law supposed that he would not permit his judgment to be influenced by lucre, or corrupted, by entering into a consideration of the question, who would give most for his recommendation; that any traffic, therefore, which he entered into, to derive a benefit from the opportunity of recommending or appointing, was a traffic which a Court

of Equity in this country would cut down ; and it would be very difficult, I think, if that principle be maintained, that a man shall for lucre recommend, that he shall for lucre, do that which is the strongest act of recommendation, appoint.

"The agreement, upon the very face of it, shows that it is not the law of any country that these offices are capable of sale ; that there is in the very nature of the traffic, ground for contending that it ought not to be the law of any country ; for a man cannot sit down to make such agreements, without expressing them in terms which, when your Lordships come to attend to them, point out directly the mischief of which such bargains are naturally productive. There is no proposition, I apprehend, more clear than this, at least in the law of this part of the island, that no man, executing a public office, is to be permitted on any account to take fees, other than those which the law has allotted to him ; other than those which can compulsorily be demanded. But if you once establish that the officer is to buy his office, the fact that he does purchase the office, furnishes a temptation to forget that such is the language of the law ; and immediately to address his mind to a consideration for this purpose, whether, besides the ordinary fees, he may not have voluntary fees, and extraordinary fees. And, accordingly, when parties sit down to form such a bargain as this, as he who sells wishes to make his bargain sure, and he who buys wishes to make his bargain advantageous, they look not only to the fee which the law does allow, but one looking to profit ; and the other, taking care that he who purchases shall not have more profit than in proportion to the nature of the contract between him who buys and him who sells, he stipulates, that if there is profit beyond that which is ordinary, he shall participate in the extraordinary as well as in the ordinary profits.

"It has been stated to your Lordships, that this office has been frequently sold. It has been stated to your Lordships that the office of Principal Clerk of the Bills has been frequently sold ; it has been stated, that the various offices relating to the administration of justice have been sold ; and they give you the authority of an act of Sir George Mackenzie, of a Mr. Wedderburn's concurrence in the act, and other authorities which have been stated ; and that the Court of Session, with reference to these cases, have given their authority by acts of council and acts of sederunt. I protest, for the honour of the Court of Session, against its being understood, that, by registering these bonds in their acts of council or acts of sederunt, they have ever given judgment upon their validity. These acts are done for the sake of execution, (if a question should hereafter arise, whether execution should be taken out upon such instrument), rather than considered as acts of publication, calling upon the Court to take notice, in the first instance, of the nature of them, and to decide upon them.

1802.

STEWART
v.
MILLER.

1802.
 STEWART
 v.
 MILLER

"Sir George Mackenzie is the instance in 1683; and when I mention his name, I mention a name of a great person, certainly a great person with reference to any point of law in a question of that sort. But I think there are, in the transaction of Sir George Mackenzie, reasons to suppose he doubted of the authority of the act which he was engaged.

"There is reason enough to justify this observation. But we are not to think, in this case, that the sale is legal, because it appears that there were many instances of such transactions in this and other offices.

"What are the facts? 1st. Sir Robert Anstruther asked £2, or £2800 to appoint him. The appellant represents Sir Robert Anstruther, debtor to his son, for the purchasing of a commission. But instead of purchasing him a commission in the Guards, he purchases up a place in the Bill Chamber. The depute, Miller, is only able to advance £1300. The office is one requiring great means and is for the benefit of his Majesty's subjects. Miller, instead of taking the whole fees, which were given for doing the duty of the office for which he was answerable in some degree to the public, agrees to take two-fifths of the fees, and to pay the rest to young Anstruther. Young Anstruther is ignorant of the bargain. They are to be paid to a trustee for him.

"The agreement shows that the law of Scotland is not, that offices are unsaleable, but shows that they should be made so.

"In this country no person is entitled to take fees that can be compulsorily demanded; but if once the purchase be allowed, we may not extraordinary fees, as well as ordinary, be exacted? It stipulates for both.—(Reads agreement.) The obligation is, to pay either legal, voluntary, or *extraordinary* fees. Mark these words. They surely mean something different from legal fees. It bargains for a participation in these, as well as the legal fees. On this point I may say, it is proper to affirm the interlocutor. If Miller had taken the legal fees, the Court might have enforced this; but if he had gone farther, could the Court of Session have enforced this? The Court would have then said, you call on us not only to point out what such fees are, but also to say, whether Miller shall not rest to the parties these fees; and this goes to support the principle of the interlocutors.

"After the sale, a greater business might have raised the value of the office; but, in point of fact, this was reduced. Then the Court, knowing this, and that nothing was more essential than that persons of sufficient skill should execute such offices, and that they might live the while, whether in the knowledge of this bargain or not, they stay not to enquire, passed the Act of Sederunt authorising certain new fees.

"I stay not also here to inquire, whether this was in the power of the Court to enact? as fees have rather arisen by practice than by statute. It is agreed, on both sides, that this question is not before

(Reads Act of Sederunt, and particularly noticing the words, *to enable him to carry on the business.*)

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STEWART
v.
MILLER.

"If the Court had power to pass this Act of Sederunt, I have already said, that the whole additional fees should go to him to carry on the business. There is thus a necessity to give the whole to him. And the Court, I am sure, would rather have allowed him to struggle on with difficulty, than have granted him such a sum, in order to hand over two-fifths of it to the appellant.

"I agree, you cannot oblige parties to say, that the agreement shall not attach to additional fees; but the Court may take care, in granting new fees, that these be duly applied as granted. The Court might have said to Stewart, you may have made what agreement you please, we have only given Miller as much as to enable him to carry on the office, and no more; and it is due to the public to say, that we would rather hold the act a nullity than let you participate in the fees.

"The Lords of Session make an Act of Sederunt, granting fees not within the scope of the agreement. (Your Lordships will never drag them into it.) Miller gets into difficulties, money is advanced by Stewart, and at last he prosecutes his claim for two-fifths of the old as well as new fees. Stewart claims two-fifths of the old and new. Miller contends that neither are claimable. The Court then inquires into the transaction, and then the truth comes out. The Court negatively sustains the validity of the agreement as to the old fees, but not as to the new. This was not a solemn judgment; but still it is necessary to take notice of this. I find this rather waived below than judged. Miller has not appealed against this part of the case—the point is therefore not directly before you; but is before you in another point of view.

"If you find the agreement bad as to the new fees, you might do it on the principle that would find the right to neither, and so remove this negative judgment.

"One ground would be to affirm the interlocutors, on the grounds stated by the Court; but I shall have occasion to give reasons why you should do more; namely, to guard against applying your judgment to larger grounds.

"The appellant has appealed against so much of the interlocutor as has respect to the new fees, on the head of the agreement; but this is against the principle of public policy, for he insists that the Court, which has said, that the fees are given to Miller to enable him to do the duty of the office, should be called on to lend its aid in a suit to disappoint the purpose for which they are created, to disable Miller from doing duty.

"The Court was unanimous, that this language could not be held in this way; and such language could only be held with propriety—that the share of the legal fees was his. He could not pretend to fasten on fees which were necessary to do the duty. The Court,

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therefore, was clear, that though the practice of such sales of office existed, yet that their own act made it impossible for them to execute the agreement as to these fees.

“ Then the appellant comes here saying, the Court don’t know their own meaning.

“ It struck me as a very strange thing to say so ; and that we, a Court of appeal, should be called on to say, that the Court below did not know their own meaning.

“ They, on consideration and reconsideration, give a kind of negative assent to the first point ; but, as to the second, you must see it elsewhere.

“ When first I heard this appeal, I had doubt if your Lordships ought not to have expressed, whether the sale of an office was good in law, and was to be supported. When the argument was concluded, I took time to consider this. But I now think it inexpedient to decide either one way or another, on a point of Scotch law, taking care, however, not to say, that we recognised legality.

“ When sitting here as a Court of appeal, on Scotch law, you must be informed by the judgment under appeal, and by the discussion below, what was discussed ; and I think the point, whether the sale was legal in Scotland or not, was not discussed.

There is a mode of disposing of this question; and this is a great question, it shall not be waived ; but I do not see how this could be regularly done but by sending back the cause to the Court below. On the whole, without declaring an opinion as to the sale of office in Scotland, (as I shall be specially careful not to decide this with respect to the present interlocutor, I have to submit that it can not be complained of, and, to save this judgment from being urged as a precedent, I have thought it proper so to mark it.

“ With regard to costs, it is a difficult thing to say how much ought to be allowed. It ought not to be vindictive but compensatory costs. The application being for the interpretation of the Court’s own words, the judgment ought to have been final, when prompt decision was looked for ; and though, under such circumstances, we should indemnify the party against the expense of further litigation, yet this party must pay to the other party, whose means are inadequate, and I therefore think you should give £10 costs.

It was therefore

Ordered, adjudged, and declared, that the respondent not having appealed from the several interlocutors pronounced, there is sufficient ground to affirm the same, in so far as complained of by the appellant, without deciding upon any question touching the validity of the agreement originally entered into between the parties. And it is therefore ordered and adjudged, that the a-

peal be dismissed, and that the interlocutors therein complained of be affirmed, with £100 costs : but without prejudice to any such question when it may arise.

1802.

FORSTER, &c.
v.
PATERSON,
&c.

For Appellant, *Ed. Law, M. Nolan, David Monypenny.*

For Respondent, *R. Dundas, Wm. Adam, Mat. Ross.*

NOTE.—Unreported in the Court of Session.

THOMAS FORSTER, JAMES KIBBLE, JAMES BUCHANAN, and PATRICK KILGOUR, Surviving Partners of the Bonhill Printfield Company, } *Appellants ;*

Mrs. MARY PATERSON, Relict of the Deceased ROBERT ORR, Manufacturer, also Partner of the said concern, and Others, his Trustees, } *Respondents.*

House of Lords, 26th Feb. 1802.

COPARTNERSHIP — DISSOLUTION — SETTLEMENT OF PARTNERS' SHARE.—By a clause in a contract of copartnership, it was provided that a balance should be annually struck, ascertaining each partner's share of stock, and his share of profit and loss, and that this was to be signed and engrossed in the sederunt book of the company. No exact date was fixed for this ; but the balance continued to be struck annually in May. There was another clause of the contract, which provided, in the event of the death or insolvency of any of the partners, it was optional in the survivors to wind up the concern, or to pay the representatives of the deceased partner, or the creditors of an insolvent one, his share in the concern, as it was ascertained by the last balance. The last balance struck in the concern in question was on 10th May 1796, amounting to £8522 of clear profit. There ought to have been another balance struck in the following May 1797, but was not done. Mr. Orr, one of the partners, foreseeing his own death as probable, had repeatedly required the partner manager of the concern to strike the balance for that year, and took a notarial protest against his refusing to do so. He died in the end of July following ; and the company having contended that they were liable only to account for his share, according to the last struck balance ; Held them liable according to the balance that ought to have been struck in May 1797 before his death. Affirmed in the House of Lords.

The appellants, and the deceased Robert Orr, were partners in the Bonhill Printfield, carried on near Dumbarton.

1802. ton. The contract was entered into of this date, and i
 expressly provided that the concern was to be divided into
 fourteen shares of £750 each, and each partner was to have
 so many fourteenths. The fourth article of the contrac
 provided that the "books of the company, and stock in
 trade, shall be regularly balanced once in the year, and :
 "minute thereof made out, and engrossed in the company'
 "sederunt book, ascertaining each partner's stock in trade
 "and share of profit and loss ; which minute being signe
 "by a majority of the partners, shall be equally valid and
 "binding upon the whole partners, as if they had bee
 "present and signed the same."

FORSTER, &C.
 v.
 PATERSON,
 &C.
 Sep. 25, 1794.

By the sixth article, it was agreed, "That in case of t
 "death, or insolvency of any of the said partners, it shall
 "in the power of the surviving and solvent partners, with
 "thirty days after such death, or notour bankruptcy, eith
 "to dissolve the company, and to wind up the company
 "concerns, or, in their option, to pay the creditors, or repr
 "sentatives of such deceased or insolvent partner, his share
 "and stock in trade, as it stood ascertained by the las
 "signed balance in the company's books, after retaining a
 "much as will pay all debts due by him to the company
 "payable the said free balance, at the expiry of six, twelve
 "eighteen, and twenty-four months after such death or in
 "solvency, in equal proportions, with the lawful interes
 "from and after the date of the signed balance, and unt
 "payment ; and, in that case, the heirs or creditors of suc
 "deceased or insolvent partner, shall have no right to ex
 "amine into the company's books, further than to see th
 "last signed balance."

The business was entered into, and Mr. Forster acted as
 manager of the concern. For the first year, a balance in
 favour of the company was adjusted on 25th May 1795, =
 amounting to £2079. 19s. 10d. ; and, in the following year
 the balance struck in favour of the concern, on 10th May
 1796, was £8522, making in all £10,601. 19s. 10d.

Mr. Robert Orr died 9th July 1797 ; no balance was
 made up for that year ending on 25th May. Mr. Orr, be
 fore his death, had frequently urged this, and had proteste
 against any loss accruing to him or his representatives,
 consequence of Mr. Forster's and the other shareholders
 neglect to make out a balance sheet for the year endin
 25th May. Action was then raised by Mr. Orr's represen
 tatives for payment of his share of stock as at 25th May
 1797, including the profits preceding that period, and

make payment to them of the amount thereof, at the periods specified in the sixth article of the contract. 1802.

The Lord Ordinary ordered the active manager to produce the certified copies of the signed balance of the company's transactions for the years 1796 and 1797, as the same were docqueted and signed in the company's books. FORSTER, &C.
v.
PATERSON, &C.

The appellants represented against this order, contending that they were only liable, according to the sound construction of the contract, for Mr. Orr's "share and stock in trade, as it stood ascertained by the last signed balance in the company's books," and that, in terms of the said contract, Mr. Orr had no right to examine into the company's books further than to see the last balance, and therefore maintained that they had no right to enquire into the company's affairs after the balance of 1796; and craved the Lord Ordinary to alter accordingly. On this point the Lord Ordinary ordered memorials; but as the balance, as struck at 1796, was not disputed, and as interim decret was craved, this balance sheet was ordered to be produced. Feb. 15, 1799.

Upon production of which, he decerned for £2469. Against Mar. 5, 1799.

these interlocutors a representation was lodged, which was superseded until the memorials formerly ordered should come to be advised. The question was, Whether Mr. Orr's share ought to be calculated according to the last balance struck in 1796, or according to the balance that ought to have been struck in May 1797, but which had been erroneously neglected to be struck, recently before his death? and whether he was to be deprived of the benefit of the last year's profits, merely because the manager did not think proper to strike the balance? It was maintained by Mr. Orr's representatives, that as his death was foreseen, he had, under formal protest, required the manager of the company to make up the books and strike a balance, in terms of the contract, as neglect to do so might materially affect his interests; that this having been neglected, he was entitled to an accounting on the footing of a balance being struck at 25th May 1797. Nor was the sixth clause in the contract above quoted, any answer to this, because, in other clauses, it was expressly stipulated that the books and stock in trade should be regularly balanced once a-year; and this last clause must be read in connection with the first. On the other hand, the appellants maintained that the sixth article was express on the subject; and referred to the last struck balance in general terms, as the criterion and rule for regulating a deceasing partner's share. That this ne-

1802. necessarily foreclosed all further inquiry into the concerns and that the respondents, Mr. Orr's representatives, could not complain, because, had there been a loss for the last year previous to 1797 instead of a gain, they acknowledged that they would have been exempt from all liability. Besides, the balance of 1796, and the company's affairs, were under judicial discussion, and the manager was not warranted to make out any new balance until this dispute was settled, and the parties satisfied with the former balance.
- FORSTER, &C.
v.
PATERSON, &C.
- Feb. 24, 1800. The Lord Ordinary pronounced this interlocutor :—" The Lord Ordinary having advised the mutual memorials for the parties, and having resumed consideration of the representation given in by the defenders against the interlocutor of the 2d of March 1799, with the answers thereto, finds that the defenders do not allege that any thing had occurred in the condition of the company's trade which, in its own nature, made it improper that the book should be brought to a balance as at the usual period in May 1797, and the shares of the partners ascertained, in terms of the contract of copartnery ; and finds, that although they state it to have been incongruous on the part of the deceased Mr. Robert Orr to insist on this being done, while at the same time he, in conjunction with the two defenders, Messrs. Buchanan and Kilgour, was challenging the former balances made up by Thomas Forster the managing partner, as erroneous, and was endeavouring, by a course of proceedings at law, to have him removed from the management, yet it is not stated, and does not appear to be the fact, that those proceedings would occasion any difficulty whatever to Mr. Forster in stating the balance, and submitting it to the partners for their approbation ; and the Ordinary is of opinion that Mr. Forster, having been continued in the management of the company's affairs during the pendency of the proceedings carried on by Mr. Orr, and those concurring with him, it was his duty to proceed in every part thereof according to the just interest of all concerned, notwithstanding the disputes which subsisted among them. Finds that he, Mr. Forster, did wrong in not bringing the books to a balance as at the usual time in May 1797 especially when required so to do by Mr. Orr under protest and finds that the explanations which he now gives of his conduct in this respect, are in a great measure inconsistent with what is set forth by him in his answer to the protest above said ; and, on the whole matter, the Ordinary repel

“ the plea stated by the defenders, that they are bound to
 “ account only for Mr. Orr’s share, as ascertained by the
 “ balance of 10th May 1796; and finds that they must ac-
 “ count for his share as it stood at the usual period of stat-
 “ ing the balance in May 1797; and in respect it is admit-
 “ ted that the books have been brought to a balance as at
 “ the period above said, although this is alleged not to have
 “ been done till after Mr. Orr’s death, ordains the defenders
 “ to produce a certified copy of the balance sheet, in order
 “ that the share to which the pursuers, as in right of Mr.
 “ Orr, are entitled, may be ascertained; and further, finds
 “ that it is admitted by the defenders, that they are at all
 “ events liable to the pursuers to the extent of Mr. Orr’s
 “ share, as ascertained by the balance sheet of May 1796;
 “ and that they do not pretend that there is any debt owing
 “ to them by Mr. Orr, which they are entitled to retain out
 “ of it; and the Ordinary is of opinion that the defenders
 “ are not well founded in maintaining that they are not
 “ bound to pay the sum confessedly due, unless the pur-
 “ suers shall abandon the larger claims in which they are
 “ insisting; and, therefore, of new finds the defenders liable
 “ in the interim, in the payment to the pursuers of Mr.
 “ Orr’s share, according to said balance, and decerns against
 “ them, conjunctly and severally, for payment of the sum of
 “ £3292. 7s. 5d., being the amount thereof, and that at and
 “ against the term of Whitsunday next, and allows an inte-
 “ rim decret to that effect to go out and be extracted; but
 “ reserves consideration of the pursuers’ claim for bygone
 “ interest, and also of their claim for the expense of ex-
 “ tracting an interim decret, until the final issue of matters
 “ in dispute; and, with these variations, refuses the said re-
 “ presentation against the interlocutor of 5th March 1799;
 “ and prohibits any more representations to be received;
 “ and likewise, in respect it appears to the Ordinary inex-
 “ pedient that the question should go before the Court in a
 “ divided state, dispenses with any representation against
 “ any part of this interlocutor.” On two consecutive re-
 claiming petitions the Court adhered.

1802.

 FORSTER, &C.
 v.
 PATERSON, &C.

 May 13, 1800.
 May 30, —

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The sixth clause in the articles of copartnership, upon which the appellants founded their defence, is positive and express, “ that in case of
 “ the death or insolvency of any of the said partners, it shall

1802. " be in the power of the surviving and solvent partners,
 " within thirty days after such death or notour bankruptcy,
 FORSTER, &c. " either to dissolve the company, and to wind up the com-
 " pany's concerns, or, in their option, to pay the creditors
 PATERSON, &c. " or representatives of such deceased or insolvent partner,
 " his share and stock in trade, as it stood ascertained by the
 " last signed balance in the company's books, after retain-
 " ing as much as will pay all debts due by him to the com-
 " pany," &c.; " and, in that case, the heirs or creditors of
 " such deceased or insolvent partner, shall have no right to
 " examine into the company's books, further than to see the
 " last signed balance." And, therefore, by the express
 terms of this clause, the appellants were entitled to avail
 themselves of their option, and therefore to settle with the
 respondents agreeably to the balance of 10th May 1796.
 And there is no foundation for the respondents' plea, that
 the clause of the copartnership founded on by the appel-
 lants, must be read under the condition " that a balance
 " should actually have taken place at the usual period of
 " balancing." If the surviving partners had been to blame,
 or in *mala fide* in not making up the balance sheet, there
 might have been a case, but no such blame attaches. Mr.
 Orr's representatives must submit to the conditions pre-
 scribed by the contract in settling with them.



Pleaded for the Respondents.—The contract of copart-
 nership stipulates " that the books and stock in trade shall
 " be regularly balanced once in the year, and a minute
 " thereof made out and engrossed in the company's sede-
 " runt book, ascertaining each partner's stock in trade, and
 " share of profit and loss;" and it is only proceeding on
 the supposition that this article was to be punctually com-
 plied with, that it is further provided by the sixth article,
 " that the creditors or representatives of a deceasing or in-
 " solvent partner, are only to be entitled to his share, and
 " stock in trade, as it stood ascertained by the last signed
 " balance in the company's books. If the latter words were
 to be taken by themselves, and a judaical construction to
 be put thereon, it might be alleged that the heirs or credi-
 tors of a deceasing or insolvent partner, would be entitled
 to nothing more than his share of the stock, as it stood at
 the last balance, though none such had taken place for se-
 veral years preceding the death or bankruptcy, while, in the
 meantime, great profits might have been realized, from al-
 participation in which they would be totally debarre^d

But this construction is at one glance manifestly unjust and preposterous; and the sound view, is that which makes the clause founded on by the appellants, subject to, and qualified by the condition contained in the clause as to balancing the books and stock regularly every year. Were a contrary rule to hold, it would lead to the most dangerous consequences. They might retain from the deceasing partner the whole profits for the years during which no balance was struck. On this view the Court of Session decided the case of the *Dumbarton Glass Works*. In the contract, there were clauses precisely similar to those which occur in the present case, declaring that a balance should be annually struck, and that it should be in the option of the company to hold the shares of deceasing and insolvent partners, at the value put upon them in this balance. Mr. Dunlop of Garnkirk purchased a considerable share in these works, after which no balance was struck for two or three years, and, in the meantime, he became bankrupt. The other partners then declared their option to hold the share, as it stood at the preceding balance; that is, the balance which had been actually struck and signed at the distance of two or three years preceding. On the other hand, his creditors contended that his share must be taken and paid for as it stood at the period immediately preceding the bankruptcy. The Court decided on the latter footing. Even if the failure to strike a balance had arisen from accident, or some unavoidable cause, still Mr. Orr's share ought to be calculated and paid as from the date when the balance ought to have been struck. This is the more imperatively the result, where negligence and blame are apparent in the circumstances of the case. Here the company and its manager were specially required to strike a balance, and a protest taken on refusal.

1802.

FORSTER, &c.
v.
PATERSON, &c.

After hearing counsel,

LORD THURLOW said,—

“ My Lords,

“ The matters in dispute between the present parties consist of two points; 1st. At what period the settlement of accounts shall be held to have taken place, so as to regulate their several interests? The appellants insist that the balance of 1796 shall be the rule, while the respondents contend for that of 1797. The 2d point is, if an interim decree given for a partner's share, as by the balance of 1796, be well founded?

“ The first point lies in small compass. Five gentlemen enter

1802. into a partnership to carry on business together for twenty years.
 Forster, one of the partners, is appointed to be manager, and to
 Forster, &c. the company's accounts. By the articles executed, he bound him-
 v. self to act in that capacity. (Here his Lordship read the articles of
 Paterson, &c. partnership, particularly the fourth and sixth, founded on the
 parties.)

"It is admitted on both sides, that, in point of fact, the balance of 1796 was the last signed balance. The pursuers in this case proceeded against the appellants, on the ground of the balance ought to have been made in May 1797, but which had been voluntarily, as they contended, withheld. The Court of Session, Lordships know, is a court of equity, as well as of law, and will give relief in a case of fraud, or even in a case of accident. I think here the putting off the balance was premeditated, and I express my great disapprobation of the conduct of the parties.

"Mr. Orr, one of the partners, became infirm in health early in the year 1797, and he, looking to the clause in the articles which directed the balancing once in the year, after the usual period past, became very anxious for a settlement up to the 10th of May 1797. It was the duty of Forster to have done so; he was liberally paid for his trouble in managing the company affairs; but I think much he held out, in consideration of Mr. Orr's declining health.

"What is the answer made to the respondent's demand? That the balance was not signed at Mr. Orr's death, no matter what reason, and therefore the respondents must be contented with the balance of 1796.

"It was said that it was not in Forster's power to make a new balance, because Orr and two other partners had brought an action against him to get up the books, and remove him from the management; that in this action his accounts had been said to be erroneous, and that, as the settlement of 1796 was to be the foundation of the new balance of 1797, there could be no balance while the matter was *sub judice*.

"But why was the matter *sub judice*? The majority of the partners had, by the articles, a clear right to displace Forster, if they chose to do so; and it was not necessary for them to say more than that such was their pleasure. I see a good deal of impertinent matter stated on this subject; but why it was stated, except for the purpose of swelling the record, I do not perceive.

"It was said that the surviving partners had an option, either to dissolve the copartnership, or settle accounts by the last signed balance. They had such option, and they have gone on with the venture. That the accounting was delayed on account of Mr. Orr's bad health seems so clear, that one would wonder what could be said to the contrary.

"The interim decree proceeds on different grounds. It is agreed on both sides, that the respondents were, at all events, entitled to their share as by the settled balance of 1796; and the Court

therefore, most justly, according to their practice, when there is no officer appointed to receive monies paid into Court, ordered the ascertained sum to be paid in the meantime. Something has been said here with regard to interest, which I did not understand. The matter of interest is clearly reserved by the interlocutor for further consideration.

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"This appears so plain a case, tainted by the conduct of the appellants, and where they have been the cause of so much unnecessary delay, that though I am seldom inclined to give costs on appeals, I conceive this case fit to be so marked by your Lordships."

On his Lordship's motion, the case was then affirmed, with costs.

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £100 of costs.

For Appellants, *Wm. Alexander, John Clerk, M. Nolan.*

For Respondents, *Edw. Law, Wm. Adam, Chas. Hay.*

NOTE.—Unreported in the Court of Session.

(M. App. I. Usury, No. 1.)

WILLIAM WALKER, Merchant in Berwick; Messrs. SURTEES, BURDON and EMBLETON, Bankers in Berwick; Messrs. CLUNIE and HOME, Merchants in Berwick; JAMES SHERIFF, Merchant in Edinburgh; JOHN JAMIESON and SON, Merchants in Leith, and Others, Creditors on the Estate of Messrs. SINCLAIR and WILLIAM- SON, Merchants in Leith, . . .	}	Appellants;
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ROBERT ALLAN, Banker in Edinburgh,	Respondent.
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House of Lords, 2d March 1802.

USURY — ACT OF 12 QUEEN ANNE, c. 16. — ACT 31 ELIZABETH, c. 5.—(1.) A firm in Leith were in the habit of raising money by means of discounting bills with Mr. Allan, a banker. Mr. Allan charged a deduction for discount on these, ranging from ten to six per cent. And, in the several settled accounts for a period of several years, the balance, including commission, was always carried to a new account, and made to bear interest. On their bankruptcy, the creditors objected to Mr.

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Allan's claim, on the ground of usury, and raised action for the penalties, under the act of Queen Anne. The defence stated was, that the limitation of action to a year barred the present suit after that period. Held, by the Court of Session that there was no ground for the charge of usury. In the House of Lords, the case was remitted for reconsideration, with strong expression of opinion that the judgment below was wrong. (2.) Question discussed, whether the English statute of limitation of action could be operative in Scotland, and doubts as to this indicated in the House of Lords.

The appellants were creditors of Messrs. Sinclair and Williamson, merchants in Leith; and, on their bankruptcy, had occasion to question the nature of the transactions which had been carried on in the discounting of bills with the respondent, Mr. Allan, banker, by which his claim on the estate was considerably enlarged. This was by taking more than the legal amount of interest for the bills discounted with him by the bankrupts. And the creditors (appellants) therefore raised the present action, praying the Court to decree, that the respondent had contravened the provisions of the statute of the 12th Queen Anne, cap. 16, against usury, and had subjected himself to the pains and penalties thereof; and concluding that it be decerned, That the debts due by the bills, or promissory notes, stated, were null and void, and could form no claim against the estate of Sinclair and Williamson, and that the respondent was not entitled to take credit for the same. That he had incurred the penalties of the statute, and that he ought to make payment to the plaintiffs of the sum of £36,373. 0s. 3d., being the treble value of the principal sums so lent or covenanted for, or such other sum as they should be found to amount to.

The respondent and the bankrupts began their dealings in Sept. 1793, and continued till the bankruptcy of the latter in April 1796. In that period their accounts were settled not less than eleven times, and at each settlement the balance including interest and commission, was carried to a new account, which, consequently, was making a charge of *interest upon interest within the year*.

The mode in which these bill transactions were carried on was this, when Sinclair and Williamson had occasion for any considerable sum, the respondent brought some of the deposited bills to the credit of their account with him, by what he calls discounting them, but really by a short credit

or stating less than the amount, apparently without any settled rule. The mode was thus stated :—

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1795.

Oct. 12.	Three bills per letter,	£96 9 4	£94 5 7
„ 16.	On Martin,	225 0 0	221 1 6
Nov. 24.	Graham & Co.,	1560 0 0	1467 3 6
Dec. 14.	Bills per letter,	1457 18 10	1431 5 3

1796.

Jan. 11.	Three bills per letter,	1390 0 0	1364 13 3
„ 20.	Chapman's Promissory Note,	645 0 0	629 15 9
Feb. 23.	Chapman,	1040 0 0	1988 9 10
„	Atkinson,	1000 8 10	

Calculating interest on the bills thus credited, from the time of the credit given till they severally came due, it appears that the sum deducted amounts to more than at the rate of five per centum per annum. For instance, the interest, at that rate, on the first article, was £1. 0s. 7d., whereas the deduction is £2. 3s. 9d., that is, at the rate of $10\frac{1}{2}$ per cent. per annum for the number of days to run. The other items vary from $6\frac{1}{2}$ to 9 per cent.

The Lord Ordinary ordered informations to report to the Court. The respondent argued, that the action being founded entirely on the statute of Queen Anne, and brought by the appellants as common informers, for the statutory penalties, was barred in consequence of not having been commenced within a year after the alleged offence, in terms of the statute, 31 of Elizabeth, cap. 5. It was further maintained, that though the statute of Anne is silent as to the limitation, and though the statute of Elizabeth can have no force or operation in Scotland, yet, in construing the former, it must be held as containing the limitation, or as extending the statute of Elizabeth to the whole United Kingdom, since the legislature could not intend to make a distinction between the two countries, or to allow an action to be brought at any time in Scotland, while, by force of the statute of Elizabeth, it could not be commenced after a lapse of the year in England. *Separatim*, That the charges he made were not usurious, or an offence against the statute, and that they were sanctioned by practice. To this it was answered, that in point

1802. of fact, the objection had been taken so early as July 1796 (the bankruptcy being only in April preceding), when the trustee of the sequestrated estate of Sinclair and William son thought it his duty to object to the claim, upon the very grounds stated in this action. That objection, as the stated, would have then raised the question judicially, but the creditors having disagreed as to the mode, some being for entering into a submission, and others for legal prosecution, the Court was appealed to, under the authority of the bankrupt act; and it was not till February 1798 that they decided that the creditors might individually follow either course. The question, therefore, was raised *within* the year. But, in point of law, the appellants contended there was no limitation introduced by the act of Queen Anne, and no reference to any former statute; and that offences committed against the act in Scotland, may be prosecuted there at any time within which penalties in other cases might be sued for by the municipal laws of that country. To argue otherwise, is to say that an *English* statute has force in Scotland, though no British statute gives it that force, and that the judges of Scotland must, in this instance, construe the statute law of England.

May 15, 1800. The Court, of this date, found "it unnecessary, in this cause, to give judgment upon the defence of prescription, (i.e. limitation of the action), find there is no ground for the charge of usury brought against the defender, and therefore sustain the defences upon the merits; assoilzie and decern: Find the pursuers liable in expenses, and allow an account thereof to be given into Court." Of this date, the Lords decerned for expenses.

July 2, —

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—1. Money advanced upon the security of a bill of exchange not due, is, in the strictest sense, a loan, to the person who seeks to discount it; and who, by his indorsation, is obliged to repay or replace the sum advanced at the time when the bill becomes payable, in default of the acceptor; and to take more than the rate of five per cent. per annum for such accommodation, is therefore clearly against the statute, and necessarily subjects the taker to the forfeiture annexed to the offence. So far as the appellants know, or have ever heard, it is not the practice of any bank, banker, or merchant of reputation, to take more than the interest at the rate of

five per cent. for the time the bill has to run ; and, if such a practice were permitted, the statute would virtually be repealed. Interest was taken here to an exorbitant extent beyond the legal ; and, in order to excuse or disguise this, it is now attempted to be maintained that the overcharge was by way of commission ; but this is a mere cover, and is just precisely one of those devices which the statute reprobates, and against which it was intended to provide. 2. The circumstances of the frequent settlements, where the interest was repeatedly converted into capital, bearing interest within the year, is left to your Lordships' consideration without argument. The respondent, in excuse for himself, has alleged that this was done by desire of Sinclair and Williamson ; but that is impossible. They may have frequently desired to know the state of the account, but the striking of a balance, to be considered as a principal, must have been the respondent's own operation. And, at any rate, if it was against the statute, the concurrence of the debtor could afford no excuse.

Pleaded for the Respondent.—1. The appellants being private informers, did not bring the action within the time limited by the act 31 of Elizabeth, cap. 5, § 6, and therefore the present action is now barred. 2. But, in point of fact, the commission made by the respondent against Sinclair and Williamson is not usurious ; but only a fair and moderate charge for trouble and expense upon money transactions with that house to a great amount, and is warranted by the universal practice in Edinburgh, the place where the respondent carries on business.

After hearing counsel,

LORD THURLOW said,—

“ My Lords,

“(His Lordship began, by observing that the interlocutor appealed from, finds that “ there is no ground for the charge of usury brought against the respondent,” and that this was to be determined by a review of the persons who were parties to the appeal, and of the circumstances in which they appeared.)

“ The appellants were creditors of Sinclair and Williamson, who had become bankrupts in Scotland. In a sequestration in that country, as under a commission of bankruptcy in England, it was necessary to consider who were creditors, and the amount of their several claims. The trustee or assignee, and each individual creditor, had an interest to cut off, or reduce demands upon the estate. Among others, the respondent was a creditor upon this estate. Some of the other creditors thought his account ill settled—that his deal-

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ings with the bankrupts were usurious—and that, therefore, the contracts were void. And as the money had been received, the claimant claimed the penalty of usury. Others of the creditors thought that his account was fair, and that the disputed articles might be referred to arbitration. Those who contested the account, applied to the Court of Session for leave to sue the respondent, either in their own name, or in that of Mr. More as trustee. At first, I had some difficulty in not seeing Mr. More's name to the suit; but I now find that the suit was in his name.

“The conclusions of the summons are, that the debts due by the bills or promissory notes stated, were null and void, and could afford no claim against the estate of the bankrupts; that the respondent was not entitled to take credit for the same, that he had incurred the penalties of usury; and that he ought to make payment to the appellants of the sum of £36,373. 0s. 3d., being the treble value of the sums lent, or such other sum as the same should be found to amount to, one half to their use, and the other half for the public interest.

“The creditors had the forbearance not to state every particular instance of usury in the summons, but referred to certain acts stated in a condescendence.

“The defence set up by the respondent was prescription. The pursuers were private persons, and there was no public prosecutor. The defence of prescription rested on *this*, that the statute of Queen Anne must be affected in Scotland, as in England, by the statute of Elizabeth, which required that all penal actions, brought by common informers, should be commenced *within a year* after the offence is committed. It was said, besides, that the action was groundless, frivolous, and vexatious.

“As to the first ground, it was premature, on many views which might be taken of this matter. Even if the statute of Anne could be affected by an English statute of limitation, it would not have been an answer to the challenge, in regard to all the sums; but, the other defence was true, the judgment was good, and the action properly dismissed with costs, which it was right to give, if the action was groundless, frivolous, and vexatious.

“Something has been said as to the moral character of the respondent. Upon this point, when civil rights come to be discussed in a court of justice, I have only to say, that it was right and proper that justice should be administered with as little severity to private character as possible.

“The dry question is, Whether the interlocutors are right? I think they are not right. I think them wrong; and that it will be proper to send the cause back to the Court below, with directions to the Court to review their interlocutors from the beginning.

“The Court ought to examine if there was usury here. As to the prescription of the statute of Anne by the operation of an English statute, it would be singular if it should turn out that an English

was to be operative in Scotland. But that point was not the House. Another singular thing was, the different species sought here from what could be sought in England. There is an idea of it being possible in England to devise a proceeding, which should reform the account, and at the same time for the usury. It has not been determined that these two for relief can be conjoined, as the Court had found there was need for the charge of usury.

The statute of Anne is law in Scotland as well as in England; and that not more than five per cent. shall be taken for the advance of money, otherwise it shall be usury. As to a satisfaction for trouble, what has been held here in other cases held in Scotland. It is, that what is taken above five per cent. shall be a compensation for trouble, and a compensation only. The *onus probandi* lies on the taking of any sum above five per cent. and the Court are bound to satisfy the Court, that what they have taken above five per cent. is nothing but a compensation for trouble.

It appears a new doctrine to me, that if a person goes to a merchant to discount a bill, and if such merchant takes more than five per cent. that he had a right to do so.

When cases of this sort first occurred in England, and a sum above five per cent. was allowed to be taken for trouble, it became a matter of consideration to many grave and intelligent persons, and it would not soon become absolutely necessary to regulate, by a general law, the extent of the sum to be taken for trouble, as it was then deemed necessary to regulate, by a general law, the extent of the sum to be taken for the forbearance upon the loan or advance of money. This matter is now left to the jury; but the question always is, "Is it merely for trouble?" or "Is it for the forbearance upon the loan or advance of money?"

When this question is put, a person may say, I will have a certain commission upon my whole transactions. But if a mere compensation for trouble only is to be allowed, and if it lies upon the respondent to prove that a compensation for trouble only has been taken; the respondent charges *commission upon a bill, when his only trouble is to receive payment*; and if the commission so charged upon a bill payable in Leith, or the commission and discount upon a bill payable in Leith, are more than a bill payable in Glasgow, the respondent will have this to grapple with.

Is six per cent. sufficient for the bill payable in Glasgow, why not seven per cent. for the bill payable in Leith? But there are other charges, also, for bills payable at the same place.

The question had been tried before a jury, I do not mean to say that Mr. Allan could not have sustained his defence. But the question is, Can you sustain interlocutors which say, there is here need for the charges of usury, and which give expenses? The

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1802. jury would have had to consider every item of the account. The Court of Session must do the same.

WALKER, & C. v. ALLAN. “The words of the statute are, that no person ‘take *directly*’ ‘*indirectly*, for loan of any monies,’ &c., ‘above the value of, five pounds for the forbearance of £100,’ &c. And as to the additional items, not specified in the condescendence, justice requires that the whole account should be examined, and a reformation of the account at least, is due to the creditors. It has been said, you cannot go back upon accounts which have been settled. But the first item of the unsettled account is the balance of the settled account; and this balance is composed in part of the charges which are challenged. Interest must not be suffered to be made principal, and to bear interest, as is done in some instances here, eleven times in the year. You cannot go into the unsettled account without going into the settled account. The item which states the balance of the former account cannot be ascertained without going into that account. And if the penalties of usury cannot be made to attach, surely a reformation of the account is necessary; and, for this purpose, the Court must look from the beginning to the end of the account.

“There is one point more, and that is, What is the *taking* beyond five per cent., which will charge the respondent? If the money received beyond five per cent. is not carried to the credit of the account it will be difficult to say that it has not been taken.

“On these grounds, I think that this case ought to be remitted to the Court of Session to examine the account, item by item, and whether all or any of the items are usurious; and then this question will come before them, Can the penalties be recovered in this action?”

The cause was remitted accordingly.

It was ordered and adjudged that the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of generally.

For Appellants, *J. Mitford, Robert Blair, Wm. Adam,*
John Clerk.

For Respondent, *Chas. Hope, Wm. Alexander.*

NOTE.—The Court of Session, in reviewing the question generally under this remit, (Mor. App. Usury, No. 1.), found (30th June 1807) that as the act of Queen Anne introduced into Scotland certain penalties for the crime of usury, these were introduced with such qualities and limitations as already existed in England, the same law being intended in this case for both parts of the island; and, therefore, that the act of Queen Elizabeth, c. 5, limiting the action to one year, must apply. They found, “that all actions for treble

"values brought in this country, under the authority of the statute of Queen Anne against usury, are subject to the limitation applicable to such penal actions in England, and that the concurrence of his Majesty's Advocate is not necessary in the present action."

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JOHN SCOTT, Writer to the Signet, Proprietor of the Farm of Ormiston, } *Appellant.*
ALEXANDER BRODIE of Carey Street, London, Tacksman of the Farm of Ormiston, } *Respondents.*
and WILLIAM BRODIE, residing there, }

House of Lords, 10th March 1802.

LEASE—WAY-GOING CROP—STRAW AND DUNG—CUSTOM OF THE COUNTRY.—This was a question, as to whether the tenant had a right to a way-going crop, under a lease, which bore an entry at Whitsunday, and declared that his removal, on the expiry of the lease, should be at Whitsunday, from the lands, &c., and which bound him to consume the whole straw and dung upon the lands during the currency of the lease, and to carry none of the dung from the farm during the last year. The tenant began to plough, and to lay down a crop to be reaped after the expiry of his lease at Whitsunday, contending, that by the custom of the country, he was entitled to a way-growing crop. The Court of Session altered an interlocutor of the Lord Ordinary, which interdicted the ploughing and laying down of crop. On appeal to the House of Lords, the Lord Chancellor pronounced a judgment, declaring that the tenant, in this case, was not entitled to a way-going crop, and remitted the case for reconsideration.

The lands of Ormiston lately belonged to the Earl of Traquair, from whom they were purchased by the appellant.

They were let on lease, (15th March 1783), by the Earl of Traquair, to William Murray, "for the space of nineteen years, from and after the term of Whitsunday (then) next, 1783, which is thereby declared to be the term of the said William Murray's entry to the possession of the said lands and others, by virtue of these presents, by which the said William Murray binds and obliges himself and his foresaids, at the expiration of this tack, which will be at the term of Whitsunday 1802, to flit and remove from the lands and others thereby set,

1802. " and to leave the same void and redd, without any previous
 " warning or process of removing to that effect;" and also,
 SCOTT " to consume the whole straw and dung upon the lands set
 v. " during the currency of the tack, and to carry off none of
 BRODIES. " the dung from the farm during the last year of the same."

May 14, 1799. This lease was assigned to the respondent Alexander Brodie, who, being a resident in London, left the management of it to the other respondent—his relation. The lands were thereafter purchased by the appellant for £8400.

In making the purchase, the appellant certiorated himself, on examining the lease of the respondent, that it was only taken to the tenant and his heirs, and seemed to exclude assignees. The assignation was never consented to by the Earl of Traquair; but there were certain documents and settlements of accounts, signed by Lord Traquair, or his commissioners, tending to show that the respondents had been received as his Lordship's tenants. Accordingly, in the action of removing, brought to have them to remove at Whitsunday then next (1800), the Court only decerned them to remove at the term of Whitsunday 1802, being the term of the expiry of their lease.

In the meantime, the respondents having broken new ground, by ploughing and overcropping, in violation of the lease, which limited them to 150 acres of the 873 acres, thus indicating also a purpose to lay down a crop for the year after the expiry of the lease. A bill of suspension and interdiction was presented to the Lord Ordinary on the Bills, which prayed to prohibit them from ploughing any part of the said farm, after the separation "of the current crop (1801) from the ground, or from carrying off the farm any part of the straw, hay, grass, or other fodder, grown, or that may be grown upon the farm; or of the dung made, or that may be made, from the produce of the former or current crops."

- June 20, 1801. The Lord Ordinary "passed the bill, and granted the interdiction, upon caution lodged." Thereupon, a petition was presented to the Court, in which the question for discussion was, 1. Whether the respondents were entitled to a way-going crop? 2d. Whether they can be prevented from carrying away any part of the straw and dung?

The respondents contended, that by the custom of the country, a Whitsunday entry entitles to the flitting or way-going crop. and that, of consequence, he was entitled to that crop, as well as the straw and dung of it. The appellant, on the other hand, contended, 1. That from the situation

tion of the farm at the time it came into possession of the original tenant, as well as of the respondents, they were not entitled to any way-going crop. 2. That such right, and all custom in regard to it, were excluded by the terms of the lease. 3. And that there was no custom, as alleged by the respondents.

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Of this date, the Court pronounced this interlocutor:—July 4, 1801.

"The Lords having advised this petition, with the answers thereto, remit to the Lord Ordinary to alter the interlocutor reclaimed against, and to remove the interdict, without prejudice to any question that may arise between the parties, with regard to the straw, fodder, or dung; find the respondent (appellant) liable in expenses, and allow an account to be given in."

On further petition, the Court adhered.

Nov. 19, 1801.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. As to the interdict against ploughing any part of the farm, after separation of the crop 1801 from the ground, the appellant contends, that the whole farm being in grass at the entry, both of the respondents at the term of Whitsunday 1787, and of the original tenant, from whom they derived right, when he received the same at Whitsunday 1783, it followed that the respondents could not be entitled to a way-going crop, even according to the custom on which they founded, because such custom was based on the principle, that as the tenant had not received possession of the arable land until the separation of the crop from the ground, so he could not be obliged to relinquish the possession of the arable land without being entitled to a way-going crop. Besides, by the lease, what the respondents claim as a way-going crop is expressly excluded. The entry of the tenant is therein stated to be to the whole farm, at Whitsunday 1783. The endurance of the lease is declared to be for a period of nineteen years from and after that term. It is further stated in the lease, that the expiration thereof shall be at Whitsunday 1802, when the tenant obliges himself to remove from the farm. On these grounds, and also seeing the custom alluded to has not been proved, the respondents have no right to a way-going crop.

Pleaded for the Respondents.—A person who, under a colourable title, ploughs and sows the ground, must be entitled to reap the crop, though every interest he had in the land may have ceased between the time of sowing and

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the time of reaping. A tenant entitled to hold during seed-time is entitled to proceed to the last moment in the cultivation of the farm, and to reap the fruits, even though his possession in the meantime should terminate. Sir Thomas Craig lays it down, that a tenant, outgoing at Whitsunday, is entitled to reap the crop then on the ground, and to make use of the barns, &c., for the purpose of so reaping it. This right of the tenant, Craig states, is universally acknowledged. This rule is sometimes supported by custom in particular districts. And it seems admitted by the appellant that the general rule or custom for a way-going crop appears to be against him; but he contended, that the particular terms of the lease showed that the tenant was not entitled to any such. He says, that the entry is at Whitsunday, and the lease binds the tenant to remove at Whitsunday 1802, and that this obligation is absolute. This is all true, if the lease alone were to be looked to, and the general construction of such leases, and the term bearing to be a Whitsunday entry, were to be disregarded. To such a lease, so framed, and of such a farm, the law has annexed a certain right to the tenant, and that is, to a way-going crop from the arable part; and nothing short of waving that right expressly will deprive him of it. In regard to carrying off the straw and dung, undoubtedly, there is a clause in the lease binding the tenant to consume these on the farm, but this is only *during the currency of the lease* and as the lease terminated at Whitsunday 1802, the obligation in the lease could only apply to this period; and therefore the respondents were entitled to carry off the dung and straw subsequent to that period.

After hearing counsel,

LORD CHANCELLOR ELDON said,—

“ My Lords,

“ This case is important. (Here states what the appellant seeks). The respondents insist that they are entitled to a way-going crop. (This explained). The appellant contends that they have no such right, on this ground, that whatever the law might be, when there is no written agreement on the subject, yet when bound by tack, the Court must look to this alone. The appellant presented a bill of suspension and interdict, on this point, contending that the respondents had no title to a way-going crop, and, consequently, that he had right to interdict them from ploughing the ground, as the tenant could have no right to the crop, and therefore had no right to plough.

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"A way-going crop depends on the lease, and on the law as to the interpretation of it. It depends upon whether, by the lease, a way-going crop is given; and whether, in this case, it is to be sown crop, or dung or straw that the tenant may take away, after the expiry of the lease, or whether the landlord is entitled to prevent him from ploughing. During the currency of the lease, I am quite clear (and there are many cases to support it), that the landlord cannot prevent the tenant from ploughing; but if ploughed, it is still more clear, that after expiry of the lease, the landlord could not enter to take the crop. Courts of justice here would not hinder from ploughing, if the tenants were not so hindered by the lease.

"It is important, therefore, on this point, specially to guard, as this law was not argued at the Bar. It would stand as a precedent hereafter if nothing were said,—that if the tenant is not entitled to a way-going crop, the landlord can interfere in the management of the farm, though nothing be said of this in the lease.

"The landlord here prays for too much; for not only does he seek interdict against ploughing for Whitsunday crop, but also for that out of husbandry, which might be taken off before Whitsunday 1803, therefore this is too large.

"The merits contain matter for serious consideration. It is much to be lamented, that when parties settle by contract of lease, the parties should be left to usage, to which parties, on entering into the contract, in no degree refer themselves, although, if they did intend so to refer, it is perfectly easy so to do; but, with all the laxity allowed in this country, it could not be construed, as argued at the Bar, to mean what the respondents contend for.

"Here the entry to the houses and lands by the lease is at Whitsunday. By it the parties contemplate possession of houses at that term of entry, and the case of leaving houses in repair at the end of the lease, that being Whitsunday, is provided for. Then it expresses the expiry of the lease as to the lands, and declares expressly, that the tenant shall leave the same void and redd at the same time with the houses. It seems impossible to construe this lease, as the tenant does, in order to spell out of it, a way-going crop.

"But it may be matter of grave doubt, whether a Scotch lease may not be construed very much otherwise. Whether, for example, a general or particular custom of country, county, or parish, can affect the express terms of a lease? The Court are unanimous on this subject, and hold that it may. Though there were nothing in the lease, yet is the law to be taken as the tenant contends for?

"On these grounds, I hope you will not think it wrong to have discussed so much of the subject, and then to adjourn for a week.

"On the 10th of March, his Lordship proposed the following judgment:—

It was ordered and adjudged, that in this case the tenant

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will not be entitled to a way-going crop. And it is therefore ordered and adjudged that the cause be remitted back to the Court of Session to review the interlocutors complained of.

For Appellant, *William Alexander, M. Nolan.*

For Respondents, *Wm. Adam, J. H. Forbes.*

NOTE.—Under this remit back to the Court of Session, their Lordships (11th June 1802), found “In respect of the judgment of the House of Peers, alter their two interlocutors of the 4th July and 19th November 1801; and remit to the Lord Ordinary to adhere to his interlocutor of 20th June, passing the bill of suspension and interdicting the tenant.” The case then proceeded, first, before the Lord Ordinary, and then before the Court, the discussion of the question being attended with much difficulty, as to whether the judgment of the House of Lords had foreclosed discussion upon the question of a way-going crop, and was thus exhaustive of the merits, or had left that open to be reviewed. The Court ultimately came to the conclusion (2d March 1803) to give effect to the judgment of the House of Lords, declaring the tenant not entitled to a way-going crop.—*Mor. App. Tack, No. 8.*

[*Mor. 15444.*]

GEORGE WILSON, Grand Nephew of the deceased WALTER BOWMAN of Logie, being the Grandson of JEAN BOWMAN, eldest Sister-germain of WALTER BOWMAN,	} <i>Appellant;</i>
ROBERT HENDERSON, Bookseller in Cupar, Grandson of ISABEL BOWMAN, the youngest Sister-germain of the said WALTER BOWMAN,	
	} <i>Respondent.</i>

House of Lords, 29th March 1802.

DEED. — IS A DEED DEFECTIVE IN SOLEMNITIES GOOD AS AN OBLIGATION TO CONVEY? — REVOCATION. — APPROBATE AND REPROBATE.—In 1757 a party executed a deed or procuratory of resignation of his land estate in Scotland in favour of particular heirs, valid in all respects, reserving power to alter at any time during his life, and even on deathbed. He afterwards in 1763, executed a new deed, with a variation in the destina—

tion to the parties favoured, applicable to the same estate, but defective in the solemnities required in conveying heritage in Scotland. There was no express revocation in this latter deed of the former, but it was contended there was an implied revocation, from the destination being different. The Court of Session held, that the latter deed, although not executed according to the solemnities of the law of Scotland, yet contained an obligation or declaration of the granter's will; and being executed in virtue of reserved powers, was good and sufficient to found an action against the heirs to implement, and that these heirs having taken benefit from the deed 1763, could not approbate and reprobate the same deed, but were bound to implement the obligations which arose from their taking benefit. Reversed in the House of Lords.

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Walter Bowman, a Scotsman, settled at Egham, near London. Besides inheriting from his father the lands of Logie, in Fife, he acquired in England a house and some land at Egham, and considerable personal property in the public funds, and died in 1782 without issue, male or female, of his body.

Before his death, and in the year 1757, he had executed a will in the English form, disposing of his real and personal estate in England. And, by a separate deed of the same date, he executed a deed of the nature of an entail applicable to the estate of Logie, and limiting the succession to that estate to heirs male and female of the granter's body, "which failing, to James Bowman, his youngest brother of the half blood, and the heirs male of his body; " which failing, the heirs male of George Melville, son of Jean Bowman, his sister-germain, and their heirs male; " which failing, certain other substitutes; which failing, the heirs female of the body of the said George Melville;" which failing, the heirs male of a sister by the half blood, and their heirs male; "which failing, the lawful heirs male of the body of Isabella Melville, " eldest daughter of Jean Bowman, (his eldest sister by George Melville), and their heirs male;" (under this substitution the appellant was called), "which failing, to the heirs male of the body of the second daughter of Isabella Melville; which failing, to the heirs male of Agnes Henderson, the eldest daughter of his youngest sister." (Under this destination the respondent was called.) And there were other substitutes called after; and then the clause wound up in the following terms:—"which all failing, to any other person or persons who should be nominated and called to the succession by any writing under his hand at

1757.

1757.

1802. "any time thereafter; and failing such nomination, to his own nearest and lawful heirs and assignees whatever."
- WILSON v. HENDERSON. The deed reserved power "at any time in my life, *et etiam in articulo mortis*, not only to alter and change this present settlement and tailzie, but also to sell and wadset the lands.
1763. In the year 1763, Walter Bowman executed *another will*, in the English form, by which he expressly revoked *all other wills* and testaments, and validly devised his estate, real and personal, in England. And, of the same date, he executed a deed for the purpose of conveying his estate of Logie in Scotland, which was invalid, being defective in the solemnities required by the law of Scotland in the transmission of heritage. Hence the present question, arising upon the effect of the deed 1757, and of the will in 1763, together with the defective deed executed in regard to the Scotch estate of same date. There was no *express* revocation of the entail 1757; but there was an implied revocation, from the estate of Logie being of new conveyed to parties not exactly in all respects the same.
- By this last deed (1763) applicable to Logie, the granter bound himself, and his heirs and successors, to resign, and granted procuratory for resigning the said lands, to and in favour of himself, and of the heirs male of his body, "whom failing, to James Bowman, merchant in Oporto, in Portugal, his younger brother of the half blood, and the heirs male of his body; which failing, to George Melville, son of Jean Bowman, his eldest sister-germain, and the heirs male of his body; which failing, to Robert Hender-son (the respondent), grandson of Isobel Bowman, his younger sister-germain, and the heirs male of her body," &c. It contained the usual clauses of a strict entail.
- James Bowman, the first substitute, predeceased the entailer. The next substitute, by the latter deed, was George Melville. By the first deed, George Melville's son was next substitute.
- The difference between the first and latter deeds consisted in George Melville's heirs male alone being called in the first deed, but not himself; whereas, in the last, George Melville himself, as well as his heirs male, was called.
- The will 1757, as to the English estates, was found, after his death, in his repositories, cancelled; but the deed of entail 1757 was found uncanceled.
- James Melville, the son of George Melville, made up title to the estate of Logie, under the deed 1757, and possessed f

ten years before his death. After his death, he was succeeded under that entail by the appellant. But the respondent having served himself heir of tailzie and provision under the deed of 1763, he charged the appellant to enter heir under the deed 1757, to George and James Melville; and then brought the present action, concluding, 1. That the later deed of 1763, having been specially referred to in Walter Bowman's will, of the same date, and executed *unico contextu*; and George and James Melville, by taking benefit under that will, having become bound to ratify the deed of tailzie, the same was rendered a valid and effectual settlement of the estate of Logie. 2. That the appellant ought to be decerned to implement the deed of tailzie 1763, by making up titles, and denuding in favour of the respondent; and, 3. That it should be found and declared that the said deed of entail 1763, as connected with and executed in reference to the prior investitures, is valid and effectual in law, to the effect of being a good nomination of heirs, in terms of the powers reserved by the granter.

It was argued, that the first conclusion supposed that the instrument 1763 was in itself void, that the succession was open to the heirs at law, and that James Melville, as well as George, by taking under the will, were bound by the void instrument of 1763, to which the will referred. But James did not take under the will, and George, supposing him to have taken under the will, was heir at law only to a moiety of the estate of Logie. It further supposed, that George Melville had made his election; but, if he made his election, he would either have taken the whole estate, under the instrument of 1763, or one half of it, as heir at law of the testator, but he did neither the one nor the other. Moreover, the appellant did not take through George Melville. He took under the deed 1757. The conclusion also supposed the latter deed not in existence, yet this action is founded on a charge to the appellant to enter heir under this very deed. 2. The second conclusion was a necessary consequence of the first, and was liable to the same exceptions; while the third conclusion was a contradiction to the two preceding, namely, that the deed 1757 was valid, but that the deed 1763, being executed with reference to it, and, in virtue of reserved powers therein, was thereby validated, or at least good as a nomination of heirs, whereas, in point of fact, it was a distinct and separate deed of entail in itself, and being destitute of the statutory

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1802. solemnities, could not validly convey heritage in Scotland, nor good even as a nomination of heirs.

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Feb. 11, 1794. Of this date, the Ordinary, (Lord Justice Clerk M'Queen), pronounced this interlocutor, "In respect that Walter Bowman's deed of entail of the estate of Logie, 1763, is specially referred to in his will, as the settlement of his affairs, and that George Melville was not entitled to appoint and reprobate any part of the said will; and that Melville having taken up the personal estate to the amount of £10,000, finds, That he was thereby bound to ratify the said deed of entail 1763. And as the defender, George Wilson, cannot now make up titles to the said estate of Logie, as heir of James Melville, under the said entail, without being under the like obligations with him: Therefore finds, the said deed of entail, 1763, was rendered, and is now, a valid settlement of the said estate of Logie; and decerns the defender, George Wilson, to implement the same, by making up titles, and denuding in terms thereof, in favour of the pursuer and the other heirs therein mentioned."

May and 11
June 1794. On representation, the Lord Ordinary adhered; and on reclaiming petition to the Court, the Lords ordered memorials on the several points, to which the conclusions of the libel applied.

Thereupon, a counter action was repeated, *incidenter*, by the appellant, to have it declared, 1. That he had right to succeed to Logie by virtue of the entail 1757, on the supposition that it was not revoked; that he had a right to succeed to Logie, without any obligation to denude in favour of Robert Henderson. 2d. That supposing it revoked, then and in that case, the foresaid title or service of James Melville, as heir of tailzie of Walter Bowman, and the foresaid charter and infeftment following thereon, together with the foresaid charges executed by the said Robert Henderson against the pursuer, ought to be set aside, and that the appellants, George Wilson and others, heirs *ab intestato* of the said Walter Bowman, may, independent of any settlement, make up titles to the lands of Logie.

The question, whether the entail of 1763, though ineffectual as a conveyance of the estate, could operate as a good revocation of the deed 1757, was brought into the discussion by Catherine and Christian Melvilles, daughters of Jean Bowman, the eldest sister of the testator, and mother of George Melville.

Of this date, the Lords pronounced this interlocutor :—
 “ Having advised this petition, with the memorials in the
 “ cause, alter the interlocutor reclaimed from, and find
 “ that the succession to the estate of Logie falls to be go-
 “ vernal by the deed of entail executed by Walter Bowman
 “ in the year 1757, and therefore assoilzie the petitioner
 “ from the action brought against him by Robert Hender-
 “ son, and decern ; and decern also in the declarator
 “ brought by the petitioner accordingly ; but find it unne-
 “ cessary *hoc statu* to decide as to the residue of the per-
 “ sonal estate of the said Walter Bowman.”

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June 25, 1795.

The respondent, and Catherine and Christian Melvilles,
 reclaimed, when the Court again altered, and found “ the
 “ procuratory of resignation executed by Walter Bowman in
 “ 1757, was a valid and formal settlement of his estate, ex-
 “ cluding his heirs at law ; but qualified with an express
 “ reservation of powers to invert or alter the order of suc-
 “ cession, and the other clauses and conditions therein contain-
 “ ed : Find that the procuratory 1763 being formally exe-
 “ cuted, according to the *lex loci*, although not according
 “ to the solemnities of the law of Scotland, contained a
 “ sufficient declaration of the granter's will with regard to
 “ his succession, in exercise of his reserved powers, and
 “ must be held as part of the total settlement : And far-
 “ ther, that James Melville and his father having, upon
 “ their succession, taken benefit from all the deeds, were
 “ not at liberty to approbate and reprobate ; and that the
 “ subsequent heirs must be equally bound ; therefore alter
 “ the last interlocutor. Find, decern and declare in favour
 “ of Robert Henderson, accordingly.” And, on reclaiming
 petition, the Court adhered.

Jan. 31, 1797.

Feb. 21, 1797.

Against the interlocutors of the Lord Ordinary of 21st
 Feb.—May and 11th June 1794, and the interlocutors of the
 Court of Session of 31st Jan. and 21st Feb. 1797, the pre-
 sent appeal was brought to the House of Lords.

Pleaded for the Appellant.—The deed 1763, which re-
 voked the entail of 1757, is not a valid deed, either as a no-
 mination of heirs, executed under the reserved power in the
 deed 1757, or valid, from George Melville or James Mel-
 ville having derived benefit from under the will ; 1st. be-
 cause, as a nomination of heirs, the deed 1763 is not exe-
 cuted with reference to the deed 1757, but is in all respects
 a substantive and independent deed, containing all the
 clauses in the latter deed, with a number of additions and

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alterations, which, if effectual, would have totally superseded that deed. In the second place, it is equally invalid as a nomination of heirs as it is as a substantive deed, because every deed relative to heritage must be executed according to the formalities required by the law of Scotland, otherwise it is null and void; and the deed 1763 not bearing the name and designation of the writer thereof, nor those of the witnesses who attested it, was therefore null and void to all intents and purposes. 3d. Because, as to the benefit derived by George and James Melville under the will, it is clear that the will and the deed 1763 were two separate instruments; and although the will makes reference to the entail 1763 of Logie, yet it is only in so far as it directs the residue to be laid out in the purchase of lands, which the will directs to be settled on the same heirs as in the deed 1763. They are not made with reference to each other. They are not one and the same deed, but distinct settlements. And, on these grounds, the plea of approbate and reprobate cannot apply. So that the instrument 1763, which is void in itself, cannot receive effect merely because the testator, in making reference to it in his will, executed of same date, imagined it was valid and effectual. 4th. *Separatim*, But the estate of Logie must be regulated by the deed 1757, unless it has been validly revoked by the instrument 1763. This latter deed contains no express revocation of it. The deed 1757 remained uncanceled at the testator's death, and it cannot be revoked merely by an instrument conveying the same estate, which in itself is absolutely void, for want of the statutory solemnities. But even supposing the instrument 1763 sufficient to revoke the deed 1757, then the succession to the estate of Logie is open to the heirs at law, and the appellant is entitled to one-sixth part thereof.

Pleaded for the Respondent.—By the instrument 1763 the estate of Logie now descends to the respondent Robert Henderson. And though this deed be not *per se* a complete and effectual conveyance, because of its wanting the statutory solemnities, yet it is nevertheless sufficient, as a nomination of heirs, when taken in connection with the other deed 1757. It must be viewed in connection with this latter deed, and taken as an exercise of the reserved faculty contained therein. The deed 1757 remained in the power of the granter. By it, he reserved power to alter in whole or in part. It cannot therefore subsist except in so far as it has been allowed to remain unaltered. But by the deed

1763, it was *virtually* though not *expressly* revoked. The deed conveyed the estate to another, and hence an implied revocation, which is as good as an express one. Although the actual transmission of a feudal right requires the particular forms and technical clauses adapted to that purpose, yet, in order to create a personal right in favour of a particular set of heirs, entitling them to get the investiture altered, nothing more is necessary than such a deed as contains an *obligation* express, or even *virtual*, to that effect, on the proprietor or his heirs. The instrument 1763 is, both in form and substance, binding on the *granter* and *his heirs*, to resign the lands of Logie, in favour and for new infestment of the same, to the series of heirs therein named. And this is sufficient to sustain the present action; and although this procuratory of resignation is defective in point of solemnity, according to the law of Scotland, yet, as there was a last will and testament, of the same date, disposing of Mr. Bowman's personal estate to a considerable amount, and as James Melville, and his father George Melville, took benefit from that will, and by virtue thereof possessed themselves of the whole proceeds of the estate in England, real and personal, they became bound to confirm and make good the other part of the same settlement as to Logie. And, having accepted benefit, they could not approbate and reprobate the same deed. The case of *Martin, &c. v. Martin*, Vide ante vol. iii. p. 421. was applicable to the present, where the doctrine now contended received effect in the Court below, and the House of Lords.

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After hearing counsel,

LORD THURLOW said,—

“ My Lords,

“ The interlocutor of 1795 was accurately decided, and founded on the true principles of Scotch law. I read over the other interlocutors, feeling considerable prejudice in their favour, from the great authority of the judges by whom they were pronounced, and my personal respect for most of them, but without being able to comprehend the reasons upon which they are founded.

“ I should have been glad to have gone more at length into the case, if my present state of health would have permitted it, and to have examined the different cases referred to. Most of them were originally cited by the respondents. They have little to say to the real point before us, but, so far as they have, they rather go to confirm the interlocutor of 1795. But I shall shortly state why I

1802. think the *interlocutor* of 1795 ought to be affirmed, and the others reversed.

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"The clause in the deed 1757, reserving a faculty to alter and change it, is a power to dispoⁿe anew, and not a power to engraft a new succession upon the original settlement by an accessory deed. Such a power, exercised as it is contended it has been here, was never heard of as sustained in the law of Scotland. The counsel for the respondent being asked, whether he could produce any case, answers that he can produce no such case.

"There is, indeed, a power of nomination contained in the deed of 1757, which Walter Bowman might have exercised by an accessory deed; but, to have done so, he must have referred to the original instrument under which he exercised that power. Here there is no such reference to the deed of 1757 to render it effectual, even supposing that the reservation gives a power to engraft a new succession by a relative instrument.

"There never was a stricter entail, so far as seen or read of, than that created by the deed of 1757, so much so, that James Melville contravened by omitting to register it. Of the same date with that deed, there was a will relative to his English estate, of which I need say no more than that it was found cancelled at his death. There was also a subsequent will in 1763, but the deed of 1757 was found uncanceled.

"I agree with what was stated at the Bar as to the effect of a voluntary deed, like this of 1757, kept in the granter's custody, that it was completely in his power. If he had taken infestment upon it, it might have been different, still, being absolute *fiar* of the estate, he might have done what he pleased with it. But if he once published the deed, it was no longer in his power. The clause, therefore, reserving the power of revocation, and to dispoⁿe anew by an original deed of disposition, was not totally inept, since a case might happen, under which a new disposition of the estate could only be made in consequence of this reservation.

"By the will of 1763, the testator desired his personal property to be laid out on lands, which he directed to be settled in the manner described by a deed executed of the same date. I call it a deed for the sake of perspicuity, though, not being duly executed, it is void by statute. Now, let us see how far the one is combined with the other, so that the will can be said to refer to it. In no other way than by ordering how the money is to be laid out in the purchase of land, and how that land is to be settled, does this appear. This mention of the void deed may render it sufficient in respect of binding the property thus purchased, but it does so in no other respect. The consequence contended for is by no means conclusive, that because it must engraft so much as relates to the settlement described in the will upon particular heirs, that therefore it adopts the clauses which refer to another and distinct estate. This puts an end to the idea of appro-

bate and reprobate, for the deed 1763, as to conveying the estate of Logie, is a perfect nullity ; and though it is said that it is expressive of an intention to dispose, it is, as I have already observed, referred to by the will, only so far as to settle the land which is to be purchased with the English property.

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“ There is said to be a revocation. But how can a void deed be a revocation ? The operation of a void settlement can be no more effectual to revoke than to convey. If the contrary were true, it would go to reverse all the interlocutors, for they all go upon the ground that the deed 1757 is an existing deed. The attempt to fetter it by the instrument of 1763, I consider as very idle. In all Courts of justice, but especially in Scotland, where written instruments are peculiarly sacred, it is of the greatest importance that they should be construed by fixed rules of interpretation. If we once depart from principles or established rules of law, under a notion of some peculiar hardship, it will be impossible to know what estate parties are to take under a conveyance. I don't mean to pass any particular reflection on the administration of justice in the Courts in Scotland. The same thing has, in some respects, taken place in this country ; for as old Wilbraham used to say, ‘ No man could tell what a will was, until he got to the House of Lords, owing to strained niceties and refined interpretations.’ The old Scottish law was very simple in its regulations, as to heritable property, and there was no place in which titles were more secure. I cannot but say, however, that modern decisions have very much departed from that ancient simplicity.

“ I therefore move—That the interlocutors complained of be reversed ; that the interlocutor of 1795 be affirmed, and that the appellant be assoilzied from the conclusions of the action brought by the respondent, and that it be decerned for him accordingly in the declarator brought by him.”

It was therefore ordered and adjudged that the several interlocutors complained of in the appeal, so far as the same concern the estate of Logie, which belonged to the last Walter Bowman, be reversed. And find that the succession to the said estate falls to be governed by the deed of entail executed by Walter Bowman in the year 1757 ; and it is therefore ordered that the appellant be assoilzied from the action brought against him by the respondent Robert Henderson, and decern ; and decern also in the declarator brought by the appellant, according to the prayer of his declarator.

For the Appellant, *Wm. Alexander, Ro. Craigie, M. Nolan.*

For the Respondent, *Robert Blair, Wm. Adam.*

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[Mor. App. College of Justice, No. I.]

SOCIETY OF
WRITERS TO
THE SIGNET,
&c.

The KEEPER, COMMISSIONERS, and whole
SOCIETY of WRITERS to the SIGNET,

} *Appellants ;*

v.
SOCIETY OF
SOLICITORS,
&c.

The SOCIETY of SOLICITORS in the COURT of
SESSION, COURT of COMMISSION of TEINDS,
and HIGH COURT of JUSTICIARY,

} *Respondents.*

House of Lords, 7th April 1802.

EXCLUSIVE PRIVILEGES OF CLERKS TO THE SIGNET—REGULATIONS.

—The Writers to the Signet having claimed exclusive privilege in certain departments of business before the Court, enacted certain regulations increasing their fees, and, to protect their exclusive privileges, the Society of Solicitors presented a petition and complaint to the Court, complaining of these regulations. Held, in the Court of Session, that the Writers to the Signet had an exclusive privilege of libelling and preparing privileged summonses which pass on a bill, but that they had no exclusive privilege of libelling ordinary summonses which do not require to be passed on a bill ; and that they could not prohibit their members from signing such summonses. Also held, that bills of suspension and advocacy may be signed by a practitioner before the Court, whether Writer to the Signet or Agent. Affirmed in the House of Lords.

The Society of Writers to His Majesty's Signet having claimed exclusive privilege of libelling all summonses, and of signing all bills of suspension and of advocacy, and also of charging and exacting of fees therefor, according to a certain rate fixed by them, as well as the fees paid on these letters at the Signet Office and Bill Chamber respectively; they enacted several bye laws, having for their object, the confining the whole business to themselves. In particular, they enacted, 1. That no letters should pass the Signet gratis, which had before been the case ; and, 2. That no member of the Society should subscribe bills, summonses, letters, precepts, retours of service, &c. for any other, but such only as have been drawn and written by himself.

The respondents presented a petition and complaint to the Court against these regulations, as having in view the entire exclusion of the Society of Solicitors from the business of the Court ; and, besides, that they had enacted regulations in regard to matters which were entirely beyond their power and jurisdiction. More particularly they complained,

1. Against their right to increase their Signet letter fees, which was a matter only under the control of Parliament or the Court. 2. That, as agents and solicitors admitted by the Court, they had an equal right with the clerks to the Signet, to libel the summonses in those cases where they were employed by the pursuer; and, 3. That they had the same right of drawing bills of suspension and advocacy; and, 4. That the writers to the Signet had no right to prohibit solicitors from entering into partnership with agents or others not of the Society, so as to carry on such branches of business.

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&c.

The Lords, of this date, found, "That the Keeper, Com- Jan. 31, 1799.
missioners, and Society of Clerks to the Signet, though
entitled to all the privileges of a corporation, have no
power, by their own authority, to increase their legal or
established fees, and therefore prohibit and discharge
them, in time coming, from demanding or taking from the
complainers, the additional fees attempted to be estab-
lished by their act and regulation complained of, dated 1st
February 1796: Find the appellants have the exclusive
right and privilege of preparing and signing all Signet
letters, and of signing all summonses passing the Signet;
but that they have no exclusive privilege to sign or pre-
pare bills of advocacy or suspension: Find, that as they
are answerable for the form and style of libelled summon-
ses passing the Signet, they are entitled either to prepare
or revise them. But find, That they have no right to
prohibit the members of their society from signing libel-
led summonses, which may have been written, or drawn, by
others, upon such members receiving the full fees by law
exigible by them, and being satisfied that such summon-
ses are properly framed: Find, that the respondents have
a right to prohibit the members of their society from enter-
ing into partnership with agents or others, not of the so-
ciety, for carrying on any branch of business falling un-
der their exclusive privilege, as writers to the Signet;
But find, That the members of the Society may lawfully
enter into partnership with others for carrying on any
branches of business separate and distinct from their ex-
clusive department, as writers to the Signet, and, in so
far, prohibit and discharge the Keeper, Commissioners, and
Clerks of the Signet, from enforcing or carrying into exe-
cution the regulations complained of, dated the 11th day
of July 1796, and decern." On reclaiming petition, the
Court, of this date, found, "That Bills of advocacy and July 2, 1799.
suspension may be signed by the practitioner, whether

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“ writer to the Signet or agent, by whom the same a
 “ drawn or presented, but must also have marked up
 “ them the name of the writer to the Signet by whom t
 “ letters are to be afterwards expedite, that the same,
 “ passed, may be delivered to him by the clerk to the Bil
 “ Find, That the writers to the Signet have the exclusi
 “ privilege of libelling or preparing privileged summonses
 “ which pass upon a bill, but have no exclusive privilege
 “ libelling ordinary summonses, which do not require to l
 “ passed upon a bill, and that they have no right to pr
 “ hibit the members of their Society from signing any su
 “ summonses, although that part of it, which is called tl
 “ libel, may be written or drawn by others, upon receivin
 “ the full fees by law exigible for revising, or framing tl
 “ formal part of the summons, and authenticating the san
 “ by their signature ; and with these explanations and alte
 “ ations adhere to the interlocutor reclaimed against.”

Feb. 25, 1800. On reclaiming petition, the Lords pronounced this inte
 locutor, “ The Lords adhere to their interlocutor reclaim
 “ against, and refuse the desire of the petition, with tl
 “ following explanations: 1. That the name of the writ
 “ to the Signet, who is to expedite the letters upon a passe
 “ bill of advocacy or suspension, is only to be marke
 “ upon the bill when it is carried to the Signet office,
 “ order to have the letters expedite. 2. That the exclusi
 “ privilege of the writers to the Signet of libelling and pr
 “ paring summonses, extends only to those summonses
 “ which cannot pass the Signet without a bill.”

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1. The appellants having resolved to make additions to their charges for Signet letters, they never pretended that they had authority so to enforce such regulations, if unreasonable in themselves, or that in this respect they were subject to no control ; but they do contend, under the sanction of repeated practice, and from the reason of the thing, that they have a right to make such regulations binding on their own members, though subject to question from other parties, if by them these be deemed exorbitant. But it is not alleged that the charges here are unreasonable. The right of the Society to make such regulations has long been acquiesced in by the public, and sanctioned by the Court. 2. Their exclusive right, as Clerks to the Signet, to prepare and present bills of advocacy and suspension, is clearly established, and existed even before

the institution of the College of Justice. They had the same exclusive privilege of drawing and signing letters of suspension and advocacy. Indeed, this exclusive privilege extends to all writs passing the Signet, including summonses; and there is no warrant or authority for making any distinction between privileged and unprivileged summonses. The appellants have quoted authorities, the most direct, in support of their privilege, to libel all summonses. This right has been denied; and, it has been alleged, the exclusive privilege only regards privileged summonses, which pass the Signet on bills, because the style of these being a matter of fixed and settled form, in which it would be dangerous to allow the smallest alteration, and also because a responsibility attaches on the party whose name they bear; but this is pure invention; for the responsibility is the same in both cases, and therefore there is neither reason nor authority for making any distinction between the one and the other. 3. And further, the interlocutor appealed against, in so far as it finds that the Society is not entitled to make regulations to prevent its members from entering into partnership with persons not of the Society, for carrying on branches of business, is erroneous, because, in point of fact, they have made no regulation on that head whatever, and it is extremely problematical whether they ever shall; but, whether they do so or not, does not, and ought not, to fall within the determination of this case, thereby to prejudice such future regulations, if they shall see fit to enact the same. Even supposing that regulation now passed, the respondents could have no interest to complain, because such regulations could be made by the Society of Writers to the Signet only to affect its own members. In so far as it regulates its own members, such an agreement would be both legal and justifiable.

Pleaded for the Respondents.—1. The appellants had no right to increase their fees of their own accord; and the exactions made by them, under their late regulations, were unjust to the respondents, as well as their clients. They had no right to exact such, because the fees exigible by the clerks to the Signet have, from the earliest times, been regulated by Parliament itself. 2. The writing of bills of suspension and advocacy is the peculiar business of an agent or solicitor; and the framing and attending to them, in their progress through the Bill-Chamber, are incompatible with the office of a writer to the Signet, which was to

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attend at the Signet Office, as a clerk of the Secret State, and throw into the form of letters such warrants are brought to them in the shape of bills. Such was the original duty of writers to the Signet, and therefore they have no exclusive right of writing these bills. 3. This is still more clear, as to summonses passing the Signet, the exception of special cases, which require particular application to the Court by bill, the writers have never had the exclusive right or practice of preparing that part of those writs called the libel. The writing of those summonses, like bills of suspension and advocacy, is inseparably connected with the business of the agent and solicitor appearing before the Court. They are admitted by the Court under this understanding, and with no such restriction on their rights as the appellants point at. To hold the reverse would be to repeal the Act of Sederunt 1754, made by the Court of Session for the encouragement and protection of a body of men, whom, after experience of their services for four score years, the Court had found merited a permanent establishment under the protection of the Court.

After hearing counsel,

EARL OF ROSSLYN said,

“ My Lords,

“ This is not the first time that the present parties have been before your Lordships, in regard to the matters now at issue between them. The respondents had presented a petition and compelled the Court of Session, the subject matter of which was, that new regulations had been made to their prejudice by the writers to the Signet—a very respectable body. Both these parties were members of the Court, each in their respective departments. One of the grounds of complaint was, that while the fees of the writers to the Court were regulated by express act of Parliament, they themselves were taken upon them to increase the amount of them.

“ They asked time till the then next Session of the Court to answer the complaint. This was granted them, being a matter of course, and well understood; but of necessity, and for the sake of public convenience, the Court made an interdict, suspending the effect of the regulations till the matter was inquired into. At that interdict, so manifestly just on behalf of all the king's subjects, the appellants presented an appeal, and appeared at your Lordships' bar. Their case, however, was not argued; their counsel was in impropriety, and the appeal was withdrawn.

“ The parties then entered into a discussion of this matter before the Court of Session; and it has been the subject of very liberal inquiry, first, on the part of the writers to the Signet, and after

of the agents. The result was, that the Court has established certain regulations, so that the business of the Court may be preserved in its due course, without interruption, and these appear to be dictated with great propriety. We have not here a matter relating to the private interests of individuals, but to the regulations of practice in a Court of justice. The impropriety of calling for your Lordships' interference, in a case like this, as far as I know, never occurred before.

"Attempts have been made in this country, at different times, to draw into discussion in one Court, what had been matter of regulation in another. But the moment such a purpose was perceived, it was put a stop to. None of such parties ever fell upon the absurd scheme of calling for the interference of your Lordships in such a case. I am sorry that a different temper prevailed upon the present occasion.

"I know the body of writers to the Signet to be of great respectability; but we are all aware of the warmth and animosity that are apt to arise in discussing rival interests, as in the present case. I must blame the appellants exceedingly for not having obeyed the regulations laid down upon this occasion by the Court; and, to mark the displeasure of your Lordships with their conduct, I move that the interlocutors complained of be affirmed, with £100 costs."

It was accordingly

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed, with £100 costs.

For the Appellants, *Wm. Adam, John Clerk.*

For the Respondents, *Ed. Law, Chas. Hope, Ad. Gillies,
Thos. W. Baird.*

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SIR ROBERT PRESTON of Valleyfield,	} <i>Appellant ;</i>
EARL OF DUNDONALD and his Creditors, and	
ROBERT WATSON, Common Agent in the Process of Ranking and Sale of his Estates,	
	} <i>Respondents.</i>

House of Lords, 13th April 1802.

SUPERIOR AND VASSAL.—CLAUSE OF PRE-EMPTION—REAL OR PERSONAL.—In the original contract of feu between the superior and vassal, there was no pre-emption clause or obligation to give the superior the option of purchasing, in again disposing of the subject; but it was alleged that this was understood, and in a subsequent disposition of the subjects by the vassal to his brother, the latter

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granted a back bond, becoming bound to give the superior the first option of purchase. This latter party was never infeft; and the clause in the bond never entered into the subsequent dispositions or infeftments. He conveyed these subjects to trustees for the behoof of the Earl of Dundonald. The trustees entered in possession, and then divested themselves in favour of the Earl, in whose other estates it merged, and was confounded with the same as held of the crown. When the Earl's estates came to be sold to his creditors, the superior objected to the sale of Kirkbrae, on the ground of the above pre-emption in his favour. Held in the Court of Session that the right of pre-emption, in virtue of the back bond, was not a real burden on the lands, and could not be effectual against creditors. In the House of Lords the case was committed for reconsideration.

Sept. 4, 1745. By a feu contract, of this date, General Preston and Sir George Preston, Bart., conveyed a parcel of land called Kirkbrae to General James Cochrane. The consideration paid was £257. 13s. 4d.,—the lands to be held under the granters, for the annual payment of £1 of feu duty.

It was alleged that it was understood between the parties at the time of granting this conveyance, that the General and his heirs were not to be at liberty to dispose of this small piece of land to any stranger without first offering it for sale to the superior. But no stipulation of this kind, and no obligation to give an option of purchase to the granters, appeared in the feu contract, or infeftment which immediately followed thereon.

June 30, 1750. It was alleged, however, that this condition of the right was established *aliunde*; namely, by a disposition of this piece of land by General Cochrane to his brother Charles Cochrane, and a back bond of even date with the disposition, in which the latter was taken bound, “that in case the said Charles Cochrane, or his heirs and successors, should at any time hereafter, sell and dispose of the said lands, that the said Sir George Preston and his heirs should have the first offer thereof, for payment of the sum of £257. 13s. 4d. sterling; and for a further sum of £50 money fore-said, which the said Charles Cochrane had laid out in inclosing and improving the said lands, with annual rent of the said two sums from the term of Whitsunday following the Martinmas at which such sale shall be made; therefore the said Charles Cochrane bound and obliged him, his heirs and successors, that in case they should at any time hereafter sell and dispose of the said lands, they

“should first make offer thereof to the said Sir George Preston, at the said sum of £257. 13s. 4d. sterling, being the price paid by the said Charles Cochrane therefor, and of the said additional sum of £50, being the money laid out in inclosing and improving the same: But declaring expressly, and under which declaration these presents were granted and no otherwise, that in case he the said Sir George Preston and his foresaids should not incline to purchase the said lands for their own proper use, then the said Charles Cochrane and his foresaids, should be at liberty to sell or dispose thereof to any other person or persons they please.”

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Charles Cochrane was never infest. He conveyed his own estate of Culross, including Kirkbrae, to trustees, for behoof of the respondent, the Earl of Dundonald. The trustees entered into possession of Kirkbrae along with the rest of the lands, and then divested themselves in favour of the Earl.

The tenure of this little possession was forgot, and confounded with the mass of the Culross estate, which was held of the crown, whereas it was held of the appellant, a subject superior.

The Earl having fallen into insolvent circumstances, his estates were adjudged by his creditors, and a ranking and sale brought of them. The estates, including Kirkbrae, were about to be sold, when a petition was presented to the Court, by Sir Charles Preston, heir of Sir George Preston, setting forth, that the adjudications raised could not affect Kirkbrae, but only such estates as belong really to the Earl of Dundonald. That the Earl was not heir at law either of General James Cochrane, or of Charles Cochrane, and had no title to Kirkbrae except through James' conveyance to Charles, Charles' disposition to the trustees, and the trustees' conveyance to his Lordship, all of which remained *personal* rights, and were not clothed with infestment; and these personal rights not having been adjudged specially by the adjudications, they could not carry Kirkbrae to the creditors; but the same remained in *hereditate jacente* of James Cochrane; also explaining the *tenure* by which this property was held—stating that he was ready to pay the sum mentioned in the back bond for a reconveyance, and therefore praying the Court to order Kirkbrae to be struck out of the sale. Some years before this petition was presented, an action had been brought by the late Sir Charles Preston, insisting that he had a right of pre-emp-

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tion, that the tenure was subject to that right, and ought to be inserted in all the infeftments regarding Kirkbrae; which, after opposition on the part of the Earl, the Court pronounced this interlocutor, "That the tenor of the bond and obligation libelled on ought to be inserted in the subsequent titles and investitures of the piece of ground in question; and decerned and declared accordingly."

Nov. 20 and
 21, 1798.

When the present petition was presented, the Earl and his creditors gave it their opposition. The Court were first of opinion that the petitioner had a right to redeem the land upon payment of the sum mentioned in the petition; but afterwards, on reclaiming petition, finally pronounced this interlocutor: "The Lords find that the right of pre-emption claimed by Sir Charles Preston, in virtue of the bond, is not a real burden upon the lands of Kirkbrae, and, consequently, cannot be effectual against the creditors; and, therefore, that these lands must still be so for payment of the debts due by the common debtor, in terms of the act of roup." On reclaiming petition the Court adhered.

Dec. 7, 1798. Court adhered.

At this stage of the proceedings the petitioner died, and was succeeded by the appellant, who brought the present appeal to the House of Lords.

Pleaded for the Appellant.—The interlocutor finds, that the right of pre-emption claimed by virtue of the back bond is not effectual against the creditors of the Earl of Dundonald, because it is not a real burden upon the lands of Kirkbrae. The appellant admits that it is *not* a *real burden*, but he denies that therefore it is not effectual against the noble Lord's creditors. A real burden is that which appears *upon the record* as a clog upon the right of the person who appears to be the proprietor, *by the record*. The whole doctrine of *real* burdens proceeds upon the supposition of a real or complete feudal right in the imposer of the burden. Every person who contracts with a feudal proprietor has a right to allege that he contracted on the faith of the record and can be affected by nothing which the record did not point out as a charge *on the property*. But the case is totally different when the right of property is merely *personal*; that is, when there is no feudal right established in him, or nothing which enters the record. The creditors, or person contracting with the proprietor, can then only take or attach the estate *tantum et tale*, as it stood in the person of

him they dealt with, and must be affected by every obligation, respecting the property, however latent, which could operate against such proprietor himself. Upon this rule it is that the present case rests. Such a purchaser, contracting with one who has only a *personal right*, does not rest on the security of the records; but contracts at his own peril, and must, if he takes the right, accept of it as it stands with all its burdens. The feudal right is at this moment in the heir at law of General James Cochrane as in *hereditate jacente* of him; and Lord Dundonald is not that heir. He is not even heir by apparenecy, but holds a mere personal right. If the title had been made up and feudally completed, in Lord Dundonald having the clause of pre-emption regularly deduced and included therein, the present question could not have arisen; but when the respondents adjudgers ask your Lordships to view the question on the supposition that all this was done simply because he was under an obligation to do it, they ask what is both repugnant to law and equity. Dealing, therefore, with the question as one of *personal right*, the doctrine of real burden does not affect the question; but that *personal right* can only be taken up burdened with all the conditions by which it is affected. At all events, it was clear from the terms of the back bond, that the right of pre-emption applied only to voluntary, and not to judicial sales. In the whole circumstances, therefore, the appellant's demand for pre-emption, and to have the lands struck out of the sale, on payment of the sums mentioned in the conveyance, ought to be granted.

Pleaded for the Respondents.—The right claimed by the appellant under the back bond cannot affect the respondents, who had previously attached by diligence of the law the right of their debtor to the lands, which *ex facie* was unlimited, so far as regards the power of alienation. The clause of pre-emption, as here conceived, creates nothing but a personal obligation; and as it is an encroachment upon the power of alienation, it must be unfavourably viewed. But supposing the clause to import a legal obligation between superior and vassal, yet such burden, to be effectual against creditors and singular successors, must be created in a particular way, known in the law and practice of Scotland, and which in no particular has been adopted in the present case. Besides, the pre-emption clause does not appear in the original feu contract between the appellant's ancestor

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1802. as superior, and the respondents' predecessor, but only if the back bond stipulated to a third party, and can therefore have no effect.

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After hearing counsel, it was

Ordered and adjudged, that the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of, and particularly to find whether the back bond given by Charles Cochran on 30th June 1750, as mentioned in the pleadings, is not a real burden on the lands of Kirkbrae, it having been found by the interlocutor of 20th December 1781 "That the tenor of the back bond and obligation inserted belled on ought to be inserted in all the subsequent titles and investitures of the piece of ground in question;" which, by a decree of the Court of Session, in a process of non-entry, remains in the superior's hands, together with the mails and duties thereof, and will so continue, aye and until the lawful entry of the righteous heir; and also to find, whether the terms of the said back bond, supposing it a real burden, are not sufficient to entitle the appellant to pre-emption.

For Appellant, *Wm. Adam, A. Maconochie.*

For Respondents, *Ad. Gillies, J. P. Grant.*

NOTE.—The case in December 1781, is reported in Morison, p. 6569. Under this remit, the Court of Session found, (6th March 1805, Fac. Coll. XIII., p. 456, App. M. Personal and Real, No. 2,) "That Charles Cochrane, who granted the back bond in question in favour of Sir George Preston, had only a personal right to the lands of Kirkbrae, which never was completed by infeftment, either in his favour or in that of his successor, Lord Dundonald: Find, That the said back bond *never was inserted* in the titles of the said lands, though ordered to be so by the interlocutor of this Court in 1781; therefore, find it unnecessary to determine, whether, if the back bond had been so inserted in the titles, and infeftment had followed, it would or would not have constituted a real burden on the lands. But find, that the personal right in Charles Cochran and his successor Lord Dundonald, did remain qualified by the condition in the said back bond in favour of Sir George Preston and that the adjudication led by the creditors of Lord Dundonald can only attach the said personal right, subject to the said condition: Find, That such interest as Lord Dundonald has

"said lands is properly comprehended in the summons of sale.
Therefore find, That Sir Robert Preston has now right to redeem
said lands, on payment of the sum of £307. 13s. 4d., mentioned in
said back bond, and decern accordingly."

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Professor Bell, in a note in his Commentaries, as to this case, says, (vol. i. p. 28,) that "though the judgment does not determine the effect of the back bond, and so the point is not precisely decided; yet the judges, in delivering their opinions, had no doubt of the efficacy of such a condition, if inserted in the titles. And Lord Armadale, in particular, stated, that his father in law, Lord Justice Clerk M^cQueen, and Lord Justice Clerk Miller, were clearly of opinion, that such clauses constituted a real burden."

The RIGHT HON. VISCOUNT ARBUTHNOTT,	}	<i>Appellants;</i>
THOMAS GILLIES, and Others,		
JAMES SCOTT of Brotherton, and the Re-	}	<i>Respondents.</i>
presentatives of the deceased CHARLES		
FULLERTON of Kinnabor, and JOHN WEB-		
STER,		

House of Lords, 25th May 1802.

SALMON FISHING—DAM DYKE—IMMEMORIAL POSSESSION—RES JUDICATA.—The upper heritors on the river North Esk complained of the dam dyke erected by a lower heritor, of a certain construction, without any openings or gaps being left to afford a passage for the fish upwards, and apparently to benefit his fishings below. They also founded on an agreement, which bound him to leave an opening in the dam dyke for the passage of the fish. The defence to the action was, 1. Res judicata, by a decree in 1769, settling the rights of parties; and, 2. Immemorial possession of the dam dyke, as so constructed, which was necessary for the supply of the defenders' mills with sufficiency of water. The Court of Session, after a proof, sustained the defences. Reversed in the House of Lords; and held, that it was obvious, from the structure of this dam dyke, that the object was as much to serve the purpose of the defenders' cruive fishing as their mills, and therefore that it ought to be altered, so as not to injure the access of the fish to the upper grounds, while the service of the mills could not be enjoyed or exercised emulously, negligently, or otherwise, in prejudice of the rights of fishing, nor to a greater extent than what was fairly necessary for a supply of these mills.

The appellants are proprietors of salmon fishings in the river North Esk. Further down the river, and about two

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miles from the mouth thereof, the respondents, Mr. Scott and Mr. Fullerton, are the proprietors of mills on either side of the river. And, at this place, Mr. Scott, the only real party in the present cause, had also a right to a salmon fishing, which he is entitled to exercise, either by means of cruives, or net and coble.

In consequence of an illegal exercise of the right of fishing on the part of Mr. Scott, disputes arose between him and the adjacent heritors, which was the occasion of several law suits, one of which terminated in a decree (1684), ordaining Mr. Scott to observe the Saturday's slap, in *all* the cruives, and to have the heels of the cruives three inches wide. Another, in 1701, complained of his not making the heels of his cruives three inches wide, as required by law; and a third action in 1743. A fourth action followed in 1763; and a fifth was decided against Mr. Scott with costs in 1769; and, on appeal to the House of Lords, was partly affirmed and partly reversed in 1772. The interlocutor of the Court of Session, in that case, found, that he had a right to a cruive fishing, as well as by nett and coble; and that he was not bound to alter the then present breadth of the cruive dyke. "But in respect of the alterations made thereon since the year 1726, appear to have been made not with an intention to improve the cruive fishing, but the fishing by nett and coble, and that they are prejudicial to the superior heritors, and to the preservation of the breed of salmon in the river; therefore find, that the shoeing and causeway in the river, further down than the lower end of the keying-stones, and which extends to twelve feet in breadth, as at present constructed, must be taken away and removed," &c. "But as to the inscales, find that he is not bound to take the same out from the cruives in fishing time, but that it is sufficient to fix them back, so that they remain open for the purpose of a Saturday's slap."

In consequence of this judgment, which was affirmed, except the part regarding the removing the inscales, which was reversed and varied, Mr. Scott could no longer use the cruive dyke as a means of preventing the passage of the salmon up the river, and therefore he resolved to abandon that dyke, in order to furnish a pretence for erecting another dyke. Accordingly, some years afterwards, he resorted to the plan of erecting a new dam dyke. This erection proved much more objectionable and detrimental to the fishing than the former, from its peculiar construction; it being made

heap of loose stones, so placed together as to allow the
of water to filtrate through them, at same time pre-
venting the possibility of the river from flowing over the
of the dyke, in order to enable the fish to get up the
r.

y an agreement in 1774, Mr. Scott had become bound
ave an opening in the dam dyke for the passage of the

The present action was brought, concluding to have
und and declared that the respondents "had no right to
ect said bulwark of the extraordinary dimensions above
scribed, and therefore that these new erections ought
be demolished, and the said bulwark altogether al-
tered in its dimensions, and of new constructed, in such a
anner, and with such openings or gaps as the said Lords
all direct, so as to admit the free passage of salmon at
l times up the river; and the defenders ought and
ould be prohibited and discharged from making any al-
teration upon or addition to the new dam dyke so to be
ected under the directions of the said Lords, or of lay-
g any causeway in the channel of the river, either above
below said dyke, and from every other operation that
ay in any shape impede the free passage of salmon up
e river, under the penalty of £50 sterling, liquidated
said decree for every offence *toties quoties*; and, in the
certain time, till these regulations take effect the said James
cott, in terms of his agreement, ought to be ordained to
ake an opening of an ell wide in said bulwark at the
repest part of the river." The appellants also brought
ocation of their original application to the Sheriff *ob*
ingentiam; and both processes were conjoined.

defence to this action, the respondents pleaded, 1st.
JUDICATA, by the decret obtained in 1772. 2. That the
k dyke complained of was in the same situation in which
d been past memory of man, and therefore, that the
ondents were entitled to keep it in that situation in all
coming. It was answered, 1. That there was no *res*
ata, because the respondent, Mr. Scott, had averred,
was successful in proving, that the check dyke, in its
situation, was no obstruction to the appellants' right of
ng, as it was constantly covered with water, by the re-
itation of the river from the cruive dyke; in consequence
hich, the pursuers of that action, had, *in hoc statu*, de-
ded from their conclusions in the summons respecting
check dyke; and, accordingly, no decision was given in
d to it by the decree of 1772. 2. Since the year 1772,

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an alteration has taken place on the check dyke, in two respects, 1. In consequence of the cruive dyke having been removed, there was now no stagnation, or regurgitation of the water; and, 2. It was stated that the dyke had been materially altered and greatly enlarged since that period.

The questions which thus occurred for the determination of the Court, were, 1. Whether, in point of fact, since the decree 1772, any alteration had taken place by which the fishings of the appellants were prejudiced; and, 2. Whether, in point of law, the respondent could be compelled to give relief to the appellants, either by replacing his cruive dyke, and regulating the same in terms of the above decree; or, by making an opening in the present dyke in terms of the statute, and of the respondent's obligation to that effect?

Evidence as to the situation and effects of the former dam dyke was adduced, by producing the proof led in the former process in 1772; and also, evidence as to the situation of the present dam dyke, to show the present was more injurious than the former in interrupting the passage of the fish up the river. And also, evidence adduced to show that the dyke might be so constructed as to give a sufficient supply of water to the mills, and, at same time, to admit of a gap or opening for the passage of the fish. The Lord Ordinary, and afterwards the Court, took the opinion of surveyors on the subject, who reported and produced plans and reports.

Nov. 20, 1797. The Court pronounced this interlocutor,—“Having advised the mutual memorials for the parties, proof adduced, and writings produced, they sustain the defences pleaded for the defenders, assoilzie them from the whole conclusions of this action, and decern: Find the pursuers liable to the defenders in the expenses of the proofs and reports in this cause, and appoint an account thereof to be given into Court.” On reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—All obstructions to the passage of salmon up rivers are illegal, and have been the objects of several enactments, in order, 1. to preserve in rivers the breed of salmon, by encouraging the fish to deposit their spawn in the higher parts of the rivers; and, 2. That the rights of the upper heritors might be preserved. Hence, the regulation as to the height of dam dykes, the Saturday's slap, &c. In the present case, the respondents, Mr. Scott and his predecessors, for more than a century past, have

n endeavouring to evade the laws and regulations with respect to the exercise of their right of fishing, for the purpose of preventing the fish from having a free passage up river. In resisting these attempts, the appellants were successful in all the former actions before the Court of Session and House of Lords; but, notwithstanding, he still insists; and the present dam dyke, from the extraordinary manner in which it is erected, being composed of stones haphazardly thrown together, and industriously preserved in that state, by the operation of trenching, &c., the great body of water filtrates through, while the top of the dyke, which is very broad, and is completely dry, leaves no possibility of the fish getting over it; and, consequently, is an obstruction injurious to the appellants' right of fishing in the lower part of the river. Independently of the statute, and of common law, the appellants are entitled to insist in their alternative demand, viz. that the respondents shall either restore matters to their former state, by rebuilding or properly regulating the cruive dyke, or that they shall erect a new dam dyke in such form as to render it incapable of obstructing the appellants' fishings in a greater degree than it did formerly. And as the respondent can only exercise his own right of fishing in such a manner as not to injure the interests or rights of fishing of the upper heritors, he is not entitled to maintain the dam dyke in its present condition; because this is a total obstruction to the passage of the fish; and also, because, by the obligation in 1774, Mr. Scott is bound to leave an opening in the dyke, so as to allow a free passage for the fish. Nor is it any answer to this to say, that by immemorial possession had by the respondents of the dam dyke as it stands, cuts off all ground of complaint; because such possession has not been proved, and even if proved, could not be pleaded against the express terms of a statute, and also against the express terms of his own obligation, to leave an opening for the fish.

Pleaded for the Respondents.—The dyke in question has remained in the same form and structure past the memory of man. The appellants have not proved that the respondents have ever raised the height of the dyke. On the contrary, it is established, that it is rather lower than while the cruiue dyke existed; and that, when repaired, it was always made, as nearly as possible, of the same height as before. The check dyke is indispensably necessary for the supply of the mills with water. It is, besides, proved that the gain-shots, or the eyes of the intakes, of

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the mill leads, never were increased or enlarged; and the dyke itself is not higher than is sufficient to convey sufficient supply to the mills, even when the eyes or the intakes are full. It can therefore admit of no opening or alteration, without endangering the going, security, and supply of the mills; for it is proved, that when any breach is made in either limb of the dyke, the mills on both sides of the river are laid idle till such breach is repaired. If any alteration were at all practicable, they must have in view the supply of the mills, as well as the appellants' right of fishing; but from the report of the engineer, which declares, that an alteration of this kind could only be effected at an expense considerably beyond the value either of the respondents' mills, or the appellants' fishings, it is out of the question to suppose that the respondent is bound, either at common law, or by the statute 1696, to make any alteration or opening.

After hearing counsel,

LORD ALVANLEY,* said,

"My Lords,

"This cause was argued before your Lordships some time ago. It respects the rights of the respondents to maintain a certain dam or wear, which, it is alleged on their part, is necessary for the supply of their mills with water, but which the appellants contend is unnecessarily prejudicial to their superior fishings. The matter in dispute was of a nature peculiarly proper to be regulated by a jury, if the law of Scotland had admitted of such a mode of determining the question.

"It is matter of satisfaction to me, that I am enabled to state that my sentiments upon this cause coincide with those of a noble and learned Lord, of great experience in such questions, who attended the hearing of this cause, but who is now unfortunately absent. (Here his Lordship stated the proceedings in the cause, and interlocutors appealed from).

Lord Thurlow.
 The Chancellor did not attend the hearing, having been confined by indisposition.—
 (Note by D. R.)

"The right of fishing in this view, at the place in question, has produced no less than six actions at law.

"The first of these was in 1684. The ground of dispute then was, if the cruive dyke of the then defenders was properly constructed, and regulated according to law. A decree was then made to regulate and alter the construction of the cruive dyke, which had been improperly constructed before.

"In 1701, another action was determined, with regard to this

* Lord Alvanley was previously Sir Richard Pepper Arden, Master of the Rolls. He gave judgment in the well known case of Lord Somerville's domicile, reported in Mr. Robertson's Treatise on Personal Succession.

cruive dyke, and the Court entered into minute regulations as to its construction ; but still there was no objection made to the dam dyke for the supply of the mills.

" In 1746, there was a third action, and the squabble between the parties was still entirely with regard to the cruive dyke. By a fourth action in 1763, upon the same point, the cruive dyke was more minutely regulated.

" A fifth action was determined in 1769, which was the subject of an appeal to this House (1772). The judgment in that action goes only to regulate the cruives, and to increase their number. (Here his Lordship read the interlocutor of the Court of Session, 4th July 1769.) In that action, the pursuers had also complained of the dam for the supply of the mills, as well as of the cruive dyke ; but they did not insist upon that, and the decree went only to regulate the cruives. When it came here, by appeal, the interlocutors were affirmed, with a small variation, with £100 costs.

Down to 1780, there were no farther proceedings at law in this matter ; but, before that period, a great alteration had taken place in the state of the fishings, the cruive dyke had been carried away by floods, and, on account of the alterations thereby occasioned, the action was brought, which is now before your Lordships by appeal.

" On the part of the appellants, it is alleged, and I think is satisfactorily proved, that while the cruive dyke stood it occasioned a stagnation, and the water being pent up, prevented any filtration in the dam dyke. It is alleged also, that the alteration being found of benefit to the respondents' fishings, the cruive dyke was not restored, but that, by heightening and widening the dam dyke, the respondent resorted to another mode of fishing, by which the run of salmon was more obstructed than before, while the stagnation of the water remained. It was insisted that this was done intentionally, that more water at all times filtered through the dyke, from its construction, than was necessary for the supply of the mills, and that, except in floods, no salmon could get over the dyke. It is obvious, if the facts be as stated, the effect alleged must be produced ; the salmon cannot get over a dry obstacle of great height and breadth, they must necessarily have water to assist them in leaping.

" This is alleged upon one side, and there is little proof to the contrary on the other. The noble and learned Lord, already alluded to, concurs with me in opinion, that the removal of the cruive dyke, and the alteration of the dam, have been of prejudice to the appellants' fishings. If it be so, an action lies to abate the nuisance.

" If the case had occurred in this country, an action might have been brought for the prejudice done to the fishings ; and the jury, if they found this proved, would have given nominal damages to abate the nuisance. Here we have no question peculiar to the law of Scotland. The law, as to nuisances, must be the same in both countries. The only question in this case is, if the right of the re-

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spondents be exercised, so as not to occasion a greater nuisance the right of fishings in the river than the case requires.

"The majority in the Court below was of opinion that the pursuers had not made out their case: and the Lord President and some other judges, state their opinions to be, that mills, in the eye of the law, were prior in date, and of higher consideration than fishings. Though this position might perhaps be controverted, shall at present take it for granted; and the only question then is, if the mill dam has been constructed as beneficially to the rights of others as they have a title to expect?"

"With regard to the trial of this question, it is alleged, that while the cruive dyke stood, the salmon got easier up the river; it is asserted and in my opinion is proved, that the dam is unnecessarily open and pervious to the water. The millers alone did not construct this dam to serve themselves with water. There was some other reason for its being thus constructed, and we can be at no loss to perceive that reason. All the former questions are questions as to the fishings; as to the respondent, Mr. Scott, his fishings are the most valuable right. The moment he saw that his fishings could be carried on without his cruive dyke, with the assistance of this dam, then he abandoned his cruives altogether. There is a letter from him to another defender, Mr. Fullarton, whose mills are more valuable than his own, that he was to advance the whole money for defending the action, and that Mr. Fullarton should only bear such proportion of the expense as he chose. If this letter had come before a jury they would immediately have perceived that Mr. Scott's mills were not his only object. There is something, too, in evidence, that when Mr. Fullarton's millers were endeavouring to prevent filtration in the river, they were forbidden to do so by Mr. Scott's tenants.

"The Court, when the cause came before them, referred it to surveyors to report, if the dyke could be so constructed as to supply the mill with water, without prejudice to the appellants' fishings. Other surveyors seem to have mistaken this matter very much. Mr. Abercrombie, one of them, makes a calculation of what a dyke would cost in this rapid river, if made to last perpetually, giving a supply of water to the mills, and allowing the salmon to pass. He estimates this at the enormous sum of £5000; while he makes a calculation of another kind of dyke at £1700. All these are wrong principles; it cannot be supposed that the defenders would put themselves to so much expense. But, at the same time it is necessary that they make such alterations on their dam as will leave the obstructions not more prejudicial to the appellants than before.

"This is the whole question at issue. Have the respondents then made such alterations as are not prejudicial? They have. Might they do so? I think they might. It was said, that the alteration might be effected by facing the dyke with clay, or other

terials, so as to prevent filtration. The respondents said, If the dyke was made closer, it must be carried away by the rapidity of the river. No doubt, it may be damaged, as it is at present, but the appellants have a right that it shall be made as little prejudicial as possible. The Court below were of opinion, that the dyke was a great nuisance to the appellants; but said, that the pursuers must be at the expense of altering it. This must be matter of future consideration, if it be found that the dyke may be altered. The defenders here have no right as fishermen, and they must keep their dyke as little prejudicial as if the cruive dyke had stood as before.

"Concurring, as I do, in opinion with the noble and learned Lord already alluded to, I do not feel the hesitation I otherwise should do in differing from that given by the Court below. Indeed, this is a mere question of fact; and I am sorry that the law of Scotland does not permit matters of this sort to be determined, as the case can best be determined, by a jury, upon views of the matter in dispute. The learned Lord had furnished me with his sentiments in the shape of a motion prepared by him, which state his and my statements so distinctly, that nothing can be mistaken on this subject.

"I shall now put this motion." This was done accordingly, and carried by the House as below.

Whereupon it was ordered and adjudged that the interlocutors complained of in the appeal be, and the same are hereby reversed: And find that the pursuers, as proprietors respectively of salmon fisheries in the river of North Esk, are entitled to have as free access of salmon to their several fisheries as can be had, consistently with the rights which others have in the lower parts of the said river: Find that the defenders are proprietors respectively of ancient mills, lying on each side of a certain part of the said river below the said fisheries, and that they are entitled respectively to draw certain portions of the water from the said river, for the use of their respective mills, for which purpose they and their predecessors have, time out of mind, set up and maintained dams to carry certain quantities of water from the said river into cuts made for the use of the said mills. And it is hereby declared, that it is a quality inherent in such easement, that it must be enjoyed and exercised so as not to prejudice other rights on the same river, emulously, negligently, or otherwise, more than is necessary to the fair enjoyment of such easement: Find, that before the year 1772, the water of the said river was pen'd back to serve the said mills, by the united efficacy of two dams, one called the Cheque

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Dam, placed near the intakes of the said mill leads respectively, and the other a Cruive Dam, belonging to the defender Scott, and his predecessors, placed below the said Cheque Dam, and that by means of such dams, the water was so put back, as rarely to leave the Cheque dam dry, or obstruct the ascent of the salmon which had escaped the said cruives. But when the said cruive was abandoned, and the Cruive Dam demolished, the Cheque Dam was by no means sufficient to keep the water back, so as to be overflowed as it had theretofore been, and to give the salmon such free access to the river as had theretofore been allowed them; on the contrary, the Cheque Dam, though made much broader, was still so constructed, that more water percolated than would have served both the said mills. And it is therefore further declared, that so long as the defenders think fit to maintain the said Cheque Dam without a Cruive Dam below, so constructed as to prevent such percolation, the Cheque Dam ought, as far as circumstances will admit to be so constructed, that the water must flow over instead of percolating the same, and they must leave a slap in the said dam, in terms of the act 1696, if the same can be done without prejudice to the said mills: And it is hereby further ordered That the said cause be remitted back to the Court of Session in Scotland to proceed accordingly.

For Appellants, *John Clerk, Ad. Gillies.*

For Respondents, *R. Dundas, W. Grant, Wm. Adam
John Burnett.*

NOTE.—Under this remit, considerable litigation again took place in the Court of Session, which ended in another appeal to the House of Lords, on 20th July 1813. Vide *infra*.

DAVID HALLIDAY, Grand-nephew and heir of } *Appellant*;
line of John Carruthers, a Pauper,
AGNES MAXWELL and her Husband, - *Respondents.*

House of Lords, 9th June 1802.

SUCCESSION—DESTINATION—DISPOSITIVE CLAUSE AND CLAUSE OF
RESIGNATION—HEIRS MALE—RES JUDICATA.—In the disposi

tive clause of a settlement, an estate was conveyed to a person named, and the heirs male of his body, and to another person, and the heirs male of his body; and to a third person named, and his *heirs whatsoever*. In the procuratory of resignation the person last mentioned was not called along with his heirs whatsoever, or general; but his *heirs male*. There was no prohibition against altering the order of succession. The previous heirs male had changed the destination of the estate; and the appellant (who was not an heir male of John Carruthers, the third mentioned party, but the grandson of a brother of John Carruthers, through his mother, a daughter of this brother), claimed the estate: Held, on a construction of the dispositive and resignation clauses, that the appellant was not entitled to the estate. Affirmed in the House of Lords; the Lord Chancellor Eldon stating that the dispositive clause was to be explained by what appeared in the procuratory of resignation, and, both taken together, so as to support the intention of the granter, which was to favour the heirs male.

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Mrs. Agnes Maxwell executed a conveyance of her estate of Dinwoodie and others, "to and in favour of *Robert Maxwell*, her grandson, and his heirs male, lawfully begotten of his own body; whom failing, to *George Maxwell*, also her grandson, and his heirs male, lawfully to be begotten of his own body; whom also failing, to *John Carruthers*, likewise her grandson, upon this condition allenarly, and no otherways, that he take upon him the name and arms of *Maxwell*, and to his heirs, bearing the said name and arms of *Maxwell*, and others his assignees in his name whatsoever." This deed contained no prohibition against selling, contracting debt, or altering the order of succession.

Jan. 1, 1669.

Mrs. Maxwell executed, of same date, an assignation and discharge, which narrated and referred to the above disposition, and set forth the destination to the same parties, and in the same terms, including "John Carruthers, and his heirs and assignees whatsoever," as the last substitute.

1669.

By the obligation to infest, Mrs. Maxwell bound herself to infest and seize the said Robert Maxwell of Tinwald, for the behoof and utility of him and his heir male lawfully to be begotten of his own body, in manner above mentioned; which failing, the said George Maxwell, apparent heir of Munches, and his heirs male above written; which failing, the said John Carruthers, and his above specified."

The destination in the procuratory of resignation upon

1802. which the respondent rested his case, was in favour of the
 " said Robert Maxwell of Tinwald and his foresaids, and
 HALLIDAY " his heirs male; which failing, in favour of George Max-
 v. " well, apparent heir of Munches, and his heirs male; which
 MAXWELL, &c. " also failing, in favour of the said John Carruthers, and *his*
 " *heirs male* bearing the name and arms of Maxwell allen-
 " arly, and his assignees whatsoever."

It was stated that this last clause varied from the dispo-
 sitive clause, which disposed the estate to Robert Maxwell
 and George Maxwell, and the heirs male of *their bodies*
 only, and not as in the procuratory, to heirs male generally.

There was also this provision in the deed, " That if the
 " said George Maxwell should have no heir male lawfully
 " begotten of his own body, the said estate shall pertain and
 " accresce to the said John Carruthers, taking upon him the
 " name, and bearing the arms of Maxwell, in fee and heri-
 " tage, that then and in that case, the said John Carruthers,
 " his heirs and successors, shall pay," &c.

Robert Maxwell, the institute in this settlement, succeed-
 ed the disponent, and died without heirs male of his body in
 1707. The estate then descended to George Maxwell, who
 being a papist, and the next heir entitled to succeed (John
 Carruthers) a protestant, the latter executed a deed in fa-
 vour of George Maxwell, renouncing every right that might
 accrue to him under the statutes against popery, and the
 disability of papists to hold heritable estate in Scotland.

George Maxwell therefore continued in possession of the
 lands until his death, without making up titles to the estate.
 On his death he was succeeded by his son, William Maxwell,
 1764. who, in 1764, executed a new settlement of the estate in
 favour of himself in liferent, and his son George, his heirs
 and assignees in fee.

Afterwards (1774) George Maxwell obtained a charter of
 resignation from the crown, in terms of his father's disposi-
 tion, conceived in favour of himself, his heirs and assignees
 whatsoever, in fee, which operated an entire change of the
 destination in Mrs. Maxwell's settlement.

George Maxwell, on his marriage, entered into a contract
 of marriage (1776), whereby he provided his spouse with a
 yearly annuity of £800, payable furth of lands, including
 Dinwoodie, and settled his real estate, including said Din-
 woodie, for himself and the heirs male of the said intended
 marriage; whom failing, the heirs male to be procreated of
 his body of any subsequent marriage; whom failing, to the

heirs female of the said intended marriage; whom failing, to the heirs female to be procreated of his body of any subsequent marriage; whom all failing, to the said George Maxwell his own nearest heirs and assignees whatsoever.

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Mr. Maxwell died in 1793, without leaving issue, having been predeceased by his wife, and the respondent was his only sister and heir at law, and was served heiress in special to her brother in the said lands.

John Carruthers died without heirs of his body, but he had an only brother, James, who had an only daughter, Ann Carruthers, married to William Halliday; and the appellant was the heir of this marriage, and claimed the estate as heir male of John Carruthers, and also as heir of line.

The appellant, in these circumstances, brought a reduction and declarator, to have the gratuitous disposition of William Maxwell in 1764 set aside, as containing a different destination from that in which the estate was previously settled; and also to have it found that he had best right to succeed to the estate.

In defence to this action, it was objected to the pursuer's title, 1st. That the appellant (pursuer) was not heir male of John Carruthers; and as the succession must be regulated by the destination in the procuratory of resignation, which was in favour of "John Carruthers, and his heirs male, and his assignees whatsoever," the succession must be taken as limited to heirs male only. 2d. The action was barred by *res judicata*, because, in a former action brought on the same ground, decree of absolvitor was obtained. It was answered, 1st. That the dispositive clause, in a disposition or settlement of land, is the governing clause that settles and fixes the destination, and the heirs entitled to succeed by it: That in the dispositive clause the destination was to "John Carruthers, and his heirs and assignees whatsoever," and these terms, beyond all question, denoted the heirs of line. That it was the intention of the maker, drawn from the other parts of the deed, to call John Carruthers' heirs of line, and not to limit the succession to heirs male. And therefore, though the procuratory of resignation in the deed is in direct opposition to the dispositive clause, yet the latter cannot be affected thereby, more especially as it is obvious it has crept in *per incuriam*: 2d. The plea of *res judicata* is ill founded, because the former action was against a different party—against an heir male. This action is against the heir female of the said George Maxwell, who is not called by that deed. The plea of *res judicata*, besides,

1802. is only a plea on the merits, and not an objection to the title; and it is therefore incompetent, by the practice of Scotland, to enter into the consideration of it, in this stage of the cause.

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May 27, 1795. The Lord Ordinary (Dreghorn) pronounced this interlocutor: "Sustains the objection to the title of the pursuer and assoilzies the defenders from the action, and decerns and, in case the pursuer is not satisfied with this interlocutor, allows him to apply to the Lords for an alteration."

Nov. 19, 1795. On representation, and two several hearings, the Lord Ordinary adhered. Two short representations against these interlocutors were refused. And, on petition to the Court, the Court adhered. Also, on second petition, adhered.

Feb. 9, 1796.

Feb. 25, and

5 March —

Jan. 27, 1797.

Feb. 14, —

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—By the law of Scotland the dispositive clause of a conveyance of landed property, is that in which the series of heirs called to the succession are pointed out. Formerly this was done in the *tenendas*; but since the reign of James the I., the uniform practice has been to specify the order of succession in the dispositive clause. On this point, therefore, that is, on the question now in dispute, *that* clause must be the governing rule, and be held to control the other clauses in the deed which may appear in any degree to be inconsistent with it. This more particularly follows where the dispositive clause, as in this case, is itself clear and explicit; and it is quite incompetent to attempt to make out a contrary intention, from other parts of the deed, in opposition to legal and technical terms. In the present case, "heirs whatsoever," which is an expression synonymous with heirs of line, obviously and clearly carried the succession to the appellant as heir of line of John Carruthers. These are the express terms of the dispositive clause in Mrs. Maxwell's settlement. They are the express terms used in describing this settlement by the deed of same date with it; and these express terms of destination are borne out, from other parts of the deed indicating the strongest intention on her part to favour the *heirs whatsoever* of John Carruthers.

Pleaded for the Respondents.—Taking the whole of the settlement, and comparing the several parts together, it is clear that the destination was not to John Carruthers' heirs of line; but to his heirs male,—a character which, by his own statement, does not belong to the appellant. He has

therefore, no title or interest to challenge the subsequent titles and settlements of the estate. If the dispositive clause and procuratory of resignation had been inconsistent or contradictory, there might have been room for the question, Which ought to be preferred? If, for instance, the dispositive clause had been to heirs of line, or heirs female, and the procuratory to heirs male, or *vice versa*; but that is not the case here. The two clauses are perfectly consistent—the dispositive clause being only more *general*, and the procuratory more special and limited in its nature, and pointing out more precisely what was meant by the dispositive clause. It is further, a mistake to hold, that heirs whatsoever are synonymous with heirs of line. Heirs whatsoever is not descriptive of any particular class of heirs, but indefinite and flexible, and applicable to any description of heirs, and means either heirs of line, heirs male, heirs of conquest, heirs of provision; and to which of these it applies, must appear, either from intention, or from the deed itself. That it was intended to apply only to heirs male is strongly borne out by the whole clauses of the deed. In one clause, the term heirs whatsoever is dropped, and the term heirs male used. In construing “heirs whatsoever,” the presumption is always in favour of the heir at law or heirs of line, and these are always held to be meant by the word *Heirs*, unless by the express words in the deed, a contrary intention clearly appears; But if it appear that, by the word *heirs*, were meant any special class of *heirs*, as *heirs male*, *heirs of conquest*, &c., that construction must be adopted, and effect given to it. And the same is meant by the expression, *heirs whatsoever*. Consequently, the term *heirs whatsoever* are explained in the procuratory of resignation, in this case, to mean heirs male.

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After hearing counsel,

On 19th May 1802.

LORD CHANCELLOR ELDON said,—

“ My Lords,

“ It has been stated to your Lordships that this cause was three times argued before one learned judge of the Court of Session, and three times given against the appellant! And that, when it was carried before the whole Court to be farther considered, it was unanimously decided against the appellant by thirteen judges. The appellant,

1802. however, states, that the final judgment was given without previous argument of counsel. We have no means of deciding upon the correctness of these statements. In the present case, I cannot take upon me to move that your Lordships should give any immediate judgment against the interlocutors appealed from, contrary to what is stated to have been the unanimous opinion of the Court below. At same time, I cannot help feeling considerable difficulty in the judgment of that Court.

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Lord Thurlow.

“ It is matter of regret that this cause has come on to be argued in the absence of noble and learned Lords, whose experience might have tended to remove any difficulties that may have occurred on this subject, and particularly of one eminent person, to whom, I will venture to say, that Scotland lies under high obligations for his attention to similar subjects. I lament also that we have not the assistance in this case of the notes of opinions formed by the judges of the Court below.

“ This case is particular also, as being that of a pauper ; though I am sensible that persons in that situation are at all times, in both parts of the island, sure of the exertions of honourable persons on their behalf, where their cases deserve it ; I am not ignorant, however, that such persons often are inclined to entertain ideas of their own rights dangerous to the quiet of other individuals. The courts of the country, therefore, require a pledge that they have a good title to maintain their suits, and counsel must recommend that they have grave cause of dispute.

“ With an inclination to pay every attention to the opinion of the judges, such an opinion so weighty on this case, demands, I conceive that doubts must still have existed in the minds of the appellant’s counsel, discharging an honourable public duty, by the cause having been three times argued before the Lord Ordinary, and then carried before the Court, where it is said to have been determined without argument.

“ Here, I may take leave to say, that I wish no case were ever decided without argument on both sides. I learned this lesson from the great character to whom I have already alluded. He once mortified me, by stating that my argument had often prevailed with him against my own clients. He explained it upon this ground, that a judge, of necessity, had formed some opinion of a cause before it came to be argued ; that counsel, having more leisure, examined their case, to see what objections lay to it, and endeavoured to obviate them ; and in this way objections were often stated, which had not occurred to the judge, but were decisive of the cause.

“ In the present case, I think we have a very narrow point to determine, the description of heirs called by a certain deed. Mr Adam has stated that the whole depends upon the procuratory of resignation. If this be so, *cædit questio*. I lay out of this case every consideration of favour to either party. The respondent has acted

with great propriety; she said, that upon the deed in question the appellant had no right to maintain his action. If the procuratory of resignation does not necessarily decide this question, and if it be really a question of construction on the whole clauses of the deed, I must then think that the respondent has to grapple with a very weighty argument.

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"The conveyancers of this country are accused of great verbosity, but if Mr. Adam is correct, it is still worse in Scotland, where every clause is held to be a deed. The dispositive clause in the present deed, is to heirs in general, in so far as John Carruthers is concerned. It is said that heirs is a flexible term, and so it is held to be in this country. If lands are given to a man and his heirs, that is held to be a fee simple; but if they are given to a man and his heirs, with remainder to another and his heirs, we would inquire if this could be reconciled, on a construction of the whole deed? When you find here, in the dispositive clause, a limitation to one person, and the heirs male of his body, and to another person, and the heirs male of his body, and to a *third*, and *his heirs whatsoever*, the presumption is, that this was not so without design.

Mr. Montgomery, whom your Lordships may have heard repeatedly with satisfaction, argued well, that the obligation upon such third person, and his heirs whatsoever, to carry the name of Maxwell, was very unusual. I have no doubt that this is so; but the thing has been done in this case. The obligation to infest makes no alteration of the preceding limitation, and if the deed had stopped there, no doubt could have remained how the deed was to be understood.

"Then comes the procuratory of resignation, which mentions the heirs male of John Carruthers, which, it is contended, narrowed the preceding description of heirs general. If it be necessary that the feudal investiture from the superior be granted in the very terms of this procuratory, then there is an end of the question; but if this be not so, a difficulty occurs, because this procuratory also enlarges the preceding destination in regard to the heirs called after Robert Maxwell and George Maxwell. The dispositive clause gives the estate to them, and the heirs male of their bodies, while the procuratory gives it to heirs male generally. If the procuratory, therefore, is to be the ruling clause, this suggests considerations material with regard to the heirs of Robert and George, for as long as the remotest heir male of either of them exists, in this view, neither the appellant nor respondent could claim any right.

"When we come to the clauses relative to the contracting of debts, and payment of sums of money, by the heirs in possession, the heirs male of the bodies of Robert and George are again so distinctly mentioned, that I conceive the words heirs male in the procuratory must be held to be flexible. This would let us again into the construction of the testator's intention from the whole scope of the deed.

1802. "In these circumstances, I looked with considerable anxiety into a case quoted by Mr. Adams, as in point to the argument maintained by him; but I did not find that it made out the authority now pressed upon us. In that case, there was a first deed to heirs male, and a deed with a varying destination, sometimes heirs male, and sometimes heirs general; and, from the whole, I conceive it was properly found that heirs male were intended.

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MAXWELL, &c.
Maclachlan v.
Campbell.
Jan. 12, 1757.
Mor. 2312.

"I really feel so much doubt whether or not this case has been rightly decided, though the authority for the judgment is so great, that I think it proper to move that the further consideration of this case be put off to this day fortnight."

On 9th June 1802, Case resumed.

THE LORD CHANCELLOR ELDON said,

"My Lords,

"When this cause was last before your Lordships, I stated at the close of the argument, a sincere doubt which then occurred to me on the fitness of the interlocutors of the Court of Session, and I proposed to your Lordships to postpone the pronouncing the judgment of the House, and I am now happy to declare my satisfaction that your Lordships acquiesced in that suggestion, as it has afforded me the opportunity of more maturely considering the case, and communicating with those on whose information and judgment I can rely, and I am now free to declare, that the doubts I then entertained are entirely removed, and that my opinion is, that the judgment of the Court of Session is right, and ought to be affirmed by your Lordships.

"It was said by one of the counsel at the Bar, that this cause had not been much considered by the Court of Session, but I can assure your Lordships, from the best authority, that the case was at two different times, most deliberately considered by the whole Court, as it had three times previously been by the Lord Ordinary; and on all these occasions the judges were uniformly unanimous.

"This action takes its rise upon the construction of an instrument purporting to be a settlement of the estate of Dinwoodie, executed by a lady of the name of Agnes Maxwell, in the year 1669. This instrument appears to have been prepared by a country notary of no great knowledge in his profession, assisted by the old lady, and probably by some books of precedents, which were useful to him on all occasions; for in many of the clauses which were supplied by the books of precedents, the deed appears properly technical, but when left to himself, and particularly in the proper legal description of the heirs who were to take the estate, he shows great ignorance,

inaccuracy, and apparent contradictions. We must, therefore, take the whole deed together into our contemplation, and consider, upon a fair and rational construction of the real meaning and intention of the granter.

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"The appellant went too far when he argued, that the dispositive clause was the sole and only part of the deed which could regulate the succession of the estate to the different description of heirs who were entitled to succeed. And the respondent, perhaps, went nearly as far wrong, in arguing, that the procuratory of resignation was the only part of the deed which could be required to regulate the succession, and that every other part of the instrument must bind to the procuratory, however widely they might differ from it.

"It rather appears, however, that the one may be examined and explained by the other, or by different clauses in the same deed ; and if, upon the whole, the real intention of the granter can be rationally collected, without violence to any part of it, *that* is the sound rule to be adopted by your Lordships.

The first clause in the deed is what, in the technical language of the law of Scotland, is called the dispositive clause, and in this clause, Agnes Maxwell, the granter, dispones her estate to (here his Lordship read the destination.)

"If the estate had been given to John Carruthers and his heirs simply, without saying more, then the heirs of line of John Carruthers would have taken the estate ; but there is more than a simple destination to John Carruthers and his heirs,—there is a condition imposed, that he take upon him the name, and bear the arms of Maxwell, and to his *heirs bearing the said name and arms of Maxwell*. The nature of the condition seems to imply that it shall be taken by an heir male, who could take the name and arms, and represent the whole estate. If the estate came to be divided among heirs portioners, which, by the nature of the settlement, it could do, it might have divided among a great number of female heirs of different families, all of whom, according to the appellant's doctrine, were bound to take, and bear the name and arms of Maxwell, a thing not very probably in the contemplation of the granter, but, on the contrary, that she intended the estate should go to J. Carruthers' heirs male ; and the procuratory gives strong grounds for adopting this construction of the dispositive clause, and removing the doubts that arise from the words of it. (Here his Lordship read the words of the procuratory.)

"By this clause, the superior is directed to grant the estate to John Carruthers, and his heirs male, for the new infeftment thereof. The superior can only grant it in the manner pointed out by this clause, and must have granted it so, which would give these heirs male the feudal right to the estate under the procuratory, leaving, according to the appellant's doctrine, a personal right to the estate

1802. in the heirs whatsoever, under the dispositive clause, which is inconsistent and untenable.

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“ When I last stated my sentiments to your Lordships on this cause, it appeared to me that the procuratory had granted a larger estate in these premises to the two Maxwells than they were entitled to claim under the dispositive clause, which limited the estate of Dinwoodie to them and the heirs male of their bodies, and that the procuratory gave it to them and their heirs male general ; but, upon a more accurate inspection, I observe that the procuratory gives it to them and their heirs male *in manner above expressed*, which are words of reference to the limitation in the dispositive clause, which gives it to them and the heirs male of their body.

“ All the other parts and clauses of the deed are consistent with the procuratory, and meanings and intentions of the dispositive clause, as thus explained ; and, from a due consideration of the general tenor and contents of the whole deed, the doubts that formerly occurred to my mind are now entirely removed ; and I am of opinion the interlocutors of the Court of Session are right, and ought to be affirmed.”

It was accordingly

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Ad. Gillies, Chas. Moore.*

For the Respondents, *Edw. Law, Wm. Adam, Ad. Rolland.*

NOTE.—Unreported in the Court of Session.

JOHN HARLOW and Others, Feuars in the Barony burgh of Peterhead,	} <i>Appellants ;</i>
GOVERNORS OF THE MERCHANT MAIDEN HOSPITAL of the City of Edinburgh, GEORGE EARL OF ABERDEEN, and Others, Heritors of the Parish of Peterhead ; and the Rev. DR. MOIR, Minister of Peterhead,	
	} <i>Respondents.</i>

House of Lords, 24th June 1802.

BUILDING NEW CHURCH—WHO LIABLE—PROPORTION IN WHICH
LIABLE.—In the building of a new church in the parish of Peterhead, which is part landward and part burghal, two questions

arose, 1st. Whether the church should be repaired or rebuilt? and, 2d. Whether the expense of rebuilding should fall on the heritors of the landward part wholly, or on them and the feuars of the town proportionally? The Presbytery and the Court of Session ordered a new church to be built; and held that the expense was to be borne by the landholders and feuars of the town, according to certain proportions set forth. Reversed in the House of Lords only so far as to find that there was no custom to regulate the proportions in which the heritors were to contribute; but declaring that such charge was a parochial duty, and that it ought to be defrayed by *all* the OWNERS of *lands* and *houses*, in proportion to their real rents, and remit to the Court of Session to proceed accordingly; and interlocutors *quo ad ultra* affirmed.

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The parish of Peterhead, in the county of Aberdeen, is part landward and part burghal, consisting of the burgh of barony of Peterhead, or town or village thereof, together with a landward district. Its extent is 7000 acres. The valued rent at the time was £4500 Scots; and the real rent £3000 Sterling. The population 3800, of which 2500 resided in and about the town, a very considerable proportion of which belonged to the English church.

Some thirty years previously a parish church had been built, capable of accommodating 1200 persons; but the fabric having fallen into disrepair, some steps had been taken to have it repaired and enlarged at the estimated cost of £536. This idea was afterwards abandoned, and an application made to the presbytery by the Governors of the Merchant Maiden Hospital, who are superiors of the whole place, and who possess a considerable estate in the landward district, setting forth that the church was in a ruinous condition, and unfit to be repaired. Whereupon the presbytery and assessors being met, and having considered the whole matter, pronounced this decree: "Find the church of July 16, 1800.

"Peterhead in a ruinous condition, and unfit to be repaired,
"and therefore decree that a new church ought to be built,
"sufficient to accommodate the town and parish of Peterhead.
"The presbytery therefore resumed the consideration of the
"state of the population of the said town and parish, and
"finding that the former church contained only about 1000
"people, but on account of the increased population of the
"parish, particularly of the town of *Peterhead*, since the
"late church was built, they appoint the new church to be
"built sufficient to contain 1800 persons, allowing eighteen
"inches for each, the expense of which to be defrayed, viz.

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" 2341 of 3205 parts, to be paid by the feuars of the town of Peterhead, and the remaining 864 of the 3205 parts, by the heritors of the landward part of the parish; and they do decree accordingly; And they appoint the minister, heritor and feuars, to produce plans and estimates of a church: above, to be laid before the presbytery at their next meeting on Wednesday the 20th day of August next; and appoint the heritors, and all others concerned, against that time, to fix upon a proper site for the new church."

To this decree the feuars of the town present entered their dissent and protest, against liability for the expense of building the new church; and brought the present suspension; which, coming before Lord Glenlee, Ordinary, his Lordship passed the bill to try the question; and, deeming it of importance, ordered the parties to state the cause in informations to be given in to the whole Court.

Informations having been given in accordingly, the question came to be, Who were by law liable in the burden of erecting or supporting parish churches? or, Whether such burden had been laid upon persons of the appellants' condition, who were mere feuars, by any adequate authority since the Reformation?

The appellants contended, that although by the more ancient statutes, 12th Sept. 1563, and statute 54, 3d Parliament James VI., the burden is laid on the *parishioner* without distinction, yet this expression was always construed to mean heritors, or landholders. This view was supported by Erskine, who says, "that by long custom, those burdens, at least that of repairing churches, and churchyard walls, are transferred from the parishioners and parson, to the landholders, who must bear the expense of repairing, and even rebuilding the parish church, according to the valuation of their several lands." Besides, by the act 1690, c. 23, and 1693, c. 25, the teinds of every parish, not heritably disposed of, were vested in the patron, with the burden of "the minister's stipend, tacks of teinds already granted, and of such augmentation of stipend, future processions and erections of new kirks, as shall be just and expedient." These statutes threw the burden on those who had right to the tithes—on the patrons,—and virtually repealed the former statute 1572, which obliged the parson and whole body of parishioners to contribute to the repair and building of the churches. In support of this view, that

it is the heritors of the parish only who are by law liable in the expense of building and maintaining churches, according to the extent of their valued rent, the several commissions, and acts of Parliament, might be referred to, from 1617 downwards, respecting the plantation of kirks and valuation of teinds. The late act of 1707, c. 9, regulates the "erecting and building of new kirks, *being always with consent of the heritors* of three parts of four at least of the "valuation of the parish whereof the kirk is craved." Nothing is said here about the liability of feuars; and all the authorities concur in declaring that the burden of erecting churches is payable from the tithes of the parish, which are burdens on the heritors, in the same manner as minister's stipend, or manse, is. The cases of Crieff, 20th Nov. 1781, (Mor. 7924,) and Forfar, 16th May 1793, (Mor. 7929,) founded on by the respondents, are different from the circumstances of the present. They laid down no general rule settling the question of law as to all the parishes. On the contrary, the judgment in the Crieff case proceeds "on the circumstances of this case." And accordingly the Court, or the practice of the country, has never looked on that decision in any other light. The Court of Session, in all subsequent cases, have regarded the custom in each parish in deciding such questions. But, independently of the general point of law, and looking to the fact, that the feuars held their tenements originally of the Earl Marischall, before his attainder, with freedom from certain burdens therein enumerated, or "other burdens, accidents, perils, and inconveniences whatsoever, as well public as private, named as not named;" and that they have had possession on this tenure for nearly two hundred years, this was sufficient to exempt the feuars from all such liability. Besides, even assuming their liability, it was wrong to resolve on building a new church when reports were actually in the hands of the heritors, declaring that the church could be repaired and enlarged for a smaller sum.

The Court, of this date, found, The "Lords, on the Jan. 19, 1802. "report of Lord Glenlee, and having advised the informations, find, in terms of the decree of the presbytery, "that the present church of Peterhead is ruinous, and "that a new church ought to be built, sufficient to "accommodate the town and parish of Peterhead: Find "that the expense of building as much of the said church "as shall be necessary for accommodating the landward

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1802. " part of the parish, shall be defrayed by the heritors,
 HARLOW, &c. " according to their respective valued rents, and divided
 v. " among them in the same proportion; and that the ex-
 GOVERNORS " pense of the remaining part shall be defrayed by the
 OF THE " feuars and proprietors of houses in the town of Peterhead,
 MERCHANT " in proportion to their real rents, and divided among
 MAIDEN " them in the same proportion: Reserving entire to the
 HOSPITAL, " feuars and proprietors of houses in Peterhead all claim
 &c. " of relief competent to them against their superiors on the
 " warrandice in Earl Marischall's feu contract, or otherwise,
 " and to them their defences against the same, as accords.
 " And remit to the Lord Ordinary to hear parties with re-
 " gard to the materials of the present church, and the value
 " thereof, whether the same belong exclusively to the land-
 " ward heritors, or must be applied towards the common
 " expense of building the new church."

The minister put in a petition against this interlocutor, complaining that it was not enough to find that the new church should be built " sufficient to accommodate the town and parish of Peterhead," but that the interlocutor should have expressly found that the said church should be built so as to contain " 1800 persons," and prayed the Court to do so, and to authorize the presbytery immediately to proceed; whereupon the Court pronounced this interlocutor. " Having heard this petition, and parties, grant the first prayer, and remit the second to the Lord Ordinary to hear parties farther, and to proceed therein, and in the other points of the cause, as he shall find just."

Feb. 10, 1802.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—Where a parish consists partly of a landward district, and partly of a burgh of barony, there is no statute, and no law, for holding the feuars and proprietors of houses and tenements in the burgh liable, along with the heritors of the parish, in the expense of building or repairing the parish church. And all the institutional writers are agreed in laying down the doctrine, that such burden lies on the heritors alone. The decree, therefore, is manifestly erroneous, even were the principle of liability founded on population (which it evidently is not), because, in this last case, it ought to be an assessment upon the inhabitants at large, and not confined to the proprietors of houses, or feuars within burgh. For, on the principle of population, householders, or lessees of houses,

would be equally liable with them. If this rule be derived from the obsolete statute 1572, all the parishioners should contribute, according to their substance; but the interlocutor does not make *all* the parishioners *liable*, but only the heritors and feuars, and the proportion in which they are made liable is according to their *real* rents. The decisions in the case of Crieff and Forfar are inapplicable, and are so recent, and depending so much on their own circumstances, as that they cannot be considered as settling the law. But even if good and unquestionable, still, the custom of the parish is the rule that governs; and the custom of this parish having been, to hold the heritors liable in such expense, the interlocutors and decree are at variance with that custom.

Pleaded for the Respondents.—From the reports of the tradesmen employed to inspect the old church, it appears that the north and south walls of the church must be taken down, and the roof taken off, in order to repair it thoroughly, and that the foundation of the whole is bad. In these circumstances, a new church was the most expedient course; and a new church being resolved on, it must, according to law, be built of sufficient size and dimensions to accommodate the whole parishioners. The expense of building such church, although, by the ordinary practice in the country parishes, is laid upon the heritors alone, according to their several valued rents in the parish, and the area of the church is divided amongst them in the same proportion, yet it is evident this rule, which has been established by custom alone, is altogether inapplicable to parishes like that of Peterhead, which consists of part landward and part burgh of barony. In the latter, the situation of the parish, and its population, suggests the necessity of a different principle of liability. All have right to the church. It is an accommodation more to the burghal population than to the country population; and therefore all ought to contribute to the expense of erection. The town has, by law, a right to a share of the area of the church, which necessarily presumes that they are liable proportionally to contribute to its erection. Accordingly the Court of Session has, by several decisions, established a rule with respect to the expense of erecting churches in such circumstances as the present, founded chiefly on the particular circumstances and situation of the parish, by which the heritors of the country part of the parish are made liable for the expense of building as much of the parish church as is necessary only for their own

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accommodation, and the feuars and proprietors of houses in town are made liable for the expense of building as much as is necessary for the accommodation of the inhabitants of the town; and the area is divided amongst them in the same proportion. Such was the rule adopted in the case of Crieff, after the most deliberate discussion, which has been followed by others since that time, and ought to be followed here.

After hearing counsel,

LORD CHANCELLOR ELDON said,

“ My Lords,

(His Lordship, after reading the interlocutor appealed from, and stating the circumstances of the case, proceeded.)

“ There were three questions made in the present cause. 1st. Whether the church should be *repaired* or *rebuilt*? 2d. What size the church should be of? 3d. On whom the expense should fall?

Lord Thurlow.

“ On the first and second of these, I do not think, nor does my noble and learned friend, who has considered the matter with deep attention, that any alteration should be made in the judgment as to them. The only question then comes to be the expense; and this divides itself into two branches.

“ 1st. Whether the feuars, who are unquestionably heritors as well as those commonly described under that name, be liable in any degree? or, Whether the expense lies wholly on the landward heritors? 2d. If the feuars be liable, then in what proportion they and the landward heritors ought to contribute?

“ The first branch was a good deal agitated in the Court below, with much reference had to treatises on the subject, to ancient statutes, and to the law with regard to teinds. But it seems the true conclusion to be drawn on this part of the case is, that the burden is a parochial burden, and falls upon the landholders. This is agreeable to the sentiments of the Court of Session; and, from any thing that appears in writers of authority, or books of decisions, prior to the case of Crieff, it is impossible to say that the burden was not laid on them when a parochial burden ought to be imposed.

“ Forbes lays it down as a rule that it is a parochial burden, and to be proportioned among the heritors according to the valuation of every heritor's land. It follows from this rule, that feuars, as being also heritors, are liable in some proportion; the only question is, in what proportion? The case of Crieff, which is relied upon as a decision in point, was only pronounced in 1781, and is not even that species of authority which has ruled all questions since. It is still open to be considered, whether that case and the present have laid down the rule proper to be observed. The appellants argue, that the particular circumstances of that case of Crieff had an effect upon

the judgment; but I am not sure that your Lordships would have affirmed that case if brought before you on appeal.

1802.

"The rule in that case was, that the landward heritors were to bear a certain proportion, according to their valued rents; and the feuars the other proportion, according to their real rents. To apply this, the Court looked to the population; the town contained so many inhabitants, the landward parish so many; and, according to them, the respective quantum was fixed. The manner of apportioning that part of the expense which was allotted to the landward parish among the several heritors, was not liable to much objection. As to the allotment upon the heritors, if they were to bear an allotment to a certain extent, there was also little objection to the mode of apportioning it among them.

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"It is the same in this case; and, granting the allotments to be just, there does not appear to be much *gravamen* in the apportioning of these among the heritors themselves, and the feuars by themselves. But the appellants insist, that the rule laid down as to the allotments is not well founded on principles of law. They say, that if the rule adopted where a parish is wholly landward be considered, it is altogether different; the contribution there is according to the value of the land, not the extent of population. A variety of cases upon the subject were put to and from the Bar.

"I shall only state this case. Suppose a person builds a village upon his estate, without creating either feuars or heritors. Another person lives upon his estate, with only the persons belonging to his family; if these estates be of the same valued rent, it is admitted that these two persons would contribute in the same ratio, only, perhaps, that the valuation made in Cromwell's time, may not now bear the same proportion to the real value of each estate. The same would happen when cotton mills or other manufactories were established.

"It must be admitted, therefore, that in landward parishes there is no reference to population, but to the valuation of the estates. The question then comes to be, whether, when a parish comes to be divided by a new raised town, a different principle is to be applied, and the population resorted to as the rule for allotting between feuar and heritors.

"The rule of law is, that all the heritors should contribute according to the value of their land. It may appear strong to say, that heritors are to find a church roomy enough for the population of a town; but, if it once become a parochial burden, it must fall on the value of the land, in whatever shape it may be occupied or divided. If a different rule were adopted, greater inconveniences would follow. A manufacturer may bring into the parish what people he chooses; and it is the duty of the heritors to provide a church fit to accommodate all the parishioners.

"The land upon which houses are built in a town like this, has great value, in reference to its extent. It therefore does appear to me, that the true rule is, not that the Court should take one pro-

1802. portion of the expense for one species of heritors, and another for
 HOG, &c. another species; but that it is proper to lay the burden on the whole
 v. heritors, including the feuars of the town, according to their real
 THWAYTES, rents.
 &c. "I therefore move that the interlocutors be reversed, and that it
 be declared that the expense of building the church is a parochial
 burden, which ought to fall equally on all the heritors according to
 the real rents of their estates."

LORD THURLOW,—

"I believe it ought to be noticed in the judgment, that it is not
 meant to affect those cases which have been regulated by custom
 time out of mind."

LORD CHANCELLOR,—

"In that case, it may be intimated in the judgment, that there
 was no such custom in this parish."

On his Lordship's motion this was ordered accordingly.

Ordered and adjudged that there being no custom to re-
 gulate the proportion in which the heritors are to con-
 tribute to the rebuilding the church, the interlocutors
 complained of be reversed, in so far as they assess the
 rates at which the parishioners are to be charged to
 the rebuilding the church. And it is hereby declared
 that such charge is a parochial duty, and that it ought
 to be defrayed by all the *owners of lands and houses* in
 proportion to their real rents. And it is further order-
 ed that the said cause be remitted back to the Court of
 Session in Scotland to proceed accordingly. And it is
 further ordered and adjudged that the said interlocutors
 as to the rest be affirmed.

For Appellants, *Jas. Gordon, Arch. Campbell, jun.*

For Respondents, *Wm. Adam, W. Robertson.*

NOTE.—Unreported in the Court of Session.

[Mor. App. Legitim, No. 2.]

REBECCA HOG, otherwise LASHLEY, Spouse of THOMAS LASHLEY, Esq., and Him for his interest,	} <i>Appellants;</i>
WILLIAM THWAYTES and Others, assignees of ALEXANDER HOG, London, and THO- MAS HOG, Esq.	
	} <i>Respondents.</i>

House of Lords, 24th June 1802.

LEGITIM—DISCHARGE OF—ELECTION.—In the succession of the 1st

Roger Hog of Newliston, a younger son, Alexander, was set up in business in London, and had got several sums from his father for that purpose. He had granted a discharge to his father for £1500, stating it as "the portion bestowed on me by him;" but there was no express discharge of the legitim. After his father's death, there was found in his repositories, a discharge by his father of a subsequent sum of £4000, got by Alexander as a loan, but which the father declared to be an additional provision, and in full of all he could ask in name of legitim. This discharge, after his death, was handed over to Alexander Hog's assignees, and accepted by both. Held, in the Court of Session, that neither by the discharge granted by Alexander before his father's death, nor by what took place subsequent thereto, had he cut off his right to legitim. In the House of Lords, the interlocutor was affirmed, in so far as it held, that his legitim was not cut off by the discharge granted during the deceased's life, but reversed on the other point; and held, that the assignees, by the facts proved, inferring acceptance of this discharge, had released this claim after his death.

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v.
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&c.

The appellant, Rebecca Hog, was the eldest daughter of the late Roger* Hog of Newliston. She was married to the other appellant, Mr. Lashley, but no marriage provision was given at that time, though some time thereafter, Mr. Lashley got in loan, first £700, and afterwards, £300.

At her father's death she was left by him two bonds of provision; one for £1300, and one for £200; the former bearing to be in satisfaction of her legitim. But being advised that she could derive greater benefit by renouncing these bond provisions, and claiming her legitim, she brought an action for that purpose. This claim to legitim became of more value, from the predecease of some, and the renunciation of others of the family, who had accepted voluntary provisions in satisfaction of their claims.

Accordingly, a previous question, reported ante vol. iii. p. 248, settled, 1. That the deceased being domiciled in Scotland, his personal estate situated in England, or elsewhere, was to be regulated by the law of Scotland. 2. That the shares of those children, who accepted voluntary provisions from their father, divided among the remaining children who had not discharged their legitim. 3. That the appellant was entitled to the *whole* legitim.

* In the report of the first Appeal, ante vol. iii. p. 248; and in *Mo. Dict.*, p. 4628, "Robert" is printed by mistake, instead of "Roger."

1802. When this decision was pronounced, the assignees of
 HOG, &c. *Alexander Hog*, (who had become bankrupt, but who was
 v. one of the children alleged to have discharged his claim),
 THWAYTES, preferred a claim to one half of the whole legitim.
 &c.

Dec. 31, 1768. Alexander Hog carried on business as a grocer in London. He entered into partnership with another individual, the father giving him £1500 as his whole portion and patrimony, and £700 further in loan. Other sums were advanced, and a discharge granted, stating, "Grant me to have received from the said Roger Hog, my father, the sum of £1500, *as the portion bestowed on me by him*. As also, I acknowledge to have received the sum of £100 in payment of two legacies left me by Alexander Hog, my uncle. And which money, above written, so received by me from my said father, I have put into the Company stock and trade with D. Cameron and A. Farquhar, grocers in London, with whom I am joined in trade, and of both which sums of £1500 and £100 received by me, I discharge the said Roger Hog, my father; and I oblige myself to reiterate and renew these presents when I arrive at the age of twenty-one years."

Alexander Hog's affairs not prospering, frequent applications were made for loans, and large sums were advanced. And, at his father's death, Alexander owed his father £4000, for which he had granted two bonds of £2000 each.

On that event, his repositories being searched, there was found a discharge regularly executed by his father, narrating the two bonds, and subsuming a resolution to discharge them, in lieu of an additional provision of £4000 which he intended to have made in Alexander's favour. It contained this clause,—*"I hereby declare this discharge in lieu of the foresaid provision of £4000 which I intended to have given him, to be in full of all legitim, part, portion natural, or bairns part of gear, which he or his forebears may legally claim out of my executry, by and through my death, in any manner of way."*

Immediately after Mr. Hog's death, John Robertson, the family agent, went to London with this discharge, which he put into the possession of the respondent, Alexander Hog, assignee; and, in return, Mr. Thwaytes executed the following holograph receipt, upon a certified copy of the discharge, and delivered it to Mr. Robertson.

"London, 30th April 1789.—Received by me, assignee under the statute of bankruptcy of Alexander Hog, grocer, London, from Thomas Hog, Esq. of Newliston, by t

" hands of Mr. John Robertson, writer in Edinburgh, a discharge granted by Roger Hog of Newliston, Esq., to the said Alexander Hog, of which the three preceding pages is an exact copy.

" For self, JOHN HOWES and JOHN FREEMAN.

(Signed) " WILLIAM THWAYTES."

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Alexander Hog himself also indorsed on the same certified copy, discharge as follows:—

" *London, 30th April, 1789.*—I approve of the above mentioned discharge having been delivered to my assignees.
(Signed) " ALEXANDER HOG."

In these circumstances, the questions raised in the present case are, 1. Whether Alexander Hog's right of legitim was barred by any renunciation on his part, or on the part of his assignees? 2. Supposing it to be barred, Whether the discharge operated in favour of Thomas Hog, the heir at law of Roger Hog of Newliston, or in favour of the appellant, the only remaining child, who had not discharged her legitim? The present multiplepinding was brought to try these questions. By an additional case for the appellants, it was, in the 3d. place, submitted, That even though Alexander Hog's right of legitim should not be held to have been effectually discharged in their favour by the releases or discharges now founded on, still the appellants were entitled, under the interlocutors of the Court of Session, finding Mrs. Lashley entitled to the whole legitim, and affirmed by your Lordships, upon the former appeal brought by Mr. Thomas Hog, to recover from him the full half of the free personal estate belonging to the late Roger Hog at the time of his decease.

The second of these two questions was not determined in the Court at this stage, its consideration being superseded by the following interlocutor pronounced on the first. " On June 2 and 3, report of Lord Dreghorn, find, That Mr. Hog, the raiser of 1795. the multiplepinding, is only liable in once and single payment. Find, That Alexander Hog's claim of legitim was not cut off during the life of his father, nor by what passed after his father's death; and therefore sustain the said claim, and remit to the Lord Ordinary to proceed accordingly, and to do further in the cause as he shall see just."

On reclaiming petition, the Court adhered.

Nov. 24, 1795.

In regard to the third of the above points, the Court, on report of Lord Dreghorn, had pronounced this interlocutor,

1802. (7th June, 1791):—"Find, that the renunciation of the
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 "Hog, operated in favour of Mrs. Rebecca Hog, and has
 "same effect as the natural death of the renouncers w
 "have had; and as she is the only younger child wh
 "not renounce, find her entitled to the whole legitim."

The Court, on a reclaiming petition, adhered; and on appeal, the House of Lords affirmed, 7th May 1792.

From these, the appellant rested a plea of *res judicata*, that the *whole* of the legitim was hers. And the Court of Session having pronounced the interlocutor above quoted, of 2nd and 3d June 1795, the appellants put in a reclaiming petition; but the Court (25th November), adhered. And they also *pro forma* presented a bill of suspension, but which was refused (26th July 1800.)

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—As the right of Alexander Hog to his legitim was cut off by the discharge which he granted in the year 1768, in which he acknowledges the receipt of £1500 as the portion bestowed on him by his father, he is debarred from claiming any legitim. The respondents argue, that, in order to discharge this claim, the discharge must be *express*, and so in the present case it is. He discharges expressly the portion bestowed upon him by his father—which word portion is one of the *voces signata*, to signify, in the law of Scotland, *legitim*,—and, accordingly, this legitim is often called portion natural. No *verba solemnia* are requisite. It is enough that the intention of parties be clear from the deed to discharge the legitim; and, in this instance, both the intention and the language of the discharge are clear. But even supposing this discharge, granted during the father's life, were insufficient, still the respondents are barred, by their renunciation of Alexander's right of legitim, after the father's death, in accepting with his consent, a discharge of the debt, which he owed to his father, amounting originally to £4000, which discharge was qualified by an express condition, that it was granted "in full of all legitim, dead's part, portion natural, "or bairns' part of gear." Nor is it any answer to say, that they being Englishmen, were not informed of the consequence of accepting this discharge in the law of Scotland, because they had every opportunity and plenty of time to take advice, and acquaint themselves with the Scotch law on the subject. But the deed itself informed them on the sub-

ect; for it expressly bore, that acceptance was to operate as an extinction of the legitim. And the whole legitim heretofore goes to the appellants, which is a point no longer open, after the judgment and appeal in the former case.

Pleaded for the Respondent, Thomas Hog.—If it shall be held that Mrs. Lashley, on the ground of the decree of the Court of Session, affirmed in the House of Lords, is entitled to the whole legitim, whether situated in Scotland or elsewhere, and that this matter is not now open, the respondent, Thomas Hog, contends, that as the reason upon which his judgment proceeded, namely, *as she was the only younger child who did not renounce*, that matter must be held as finally settled; and it therefore cannot now be made a question, Whether Mrs. Lashley is entitled to the whole legitim? It must follow, that the respondent is only liable in once and single payment. It must follow further, that if Mrs. Lashley receives the whole, she must discharge the whole legitim, and warrant that discharge, according to the law of the country under which she claims it. On every view of the case, therefore, Alexander Hog, *quoad* the respondent, Thomas Hog, is to be viewed as one of those children who renounced their legitim.

Pleaded for the Assignees of Alexander Hog.—By the law of Scotland, in order to bar the claim to legitim, a clear, formal, and express discharge of that claim must be produced. It is a valuable right, founded on nature, and is never by implication, or by deeds, or facts and circumstances, which only raise up an inference, held to be renounced. The discharge granted by Alexander Hog in 1768 was inoperative, as he was then under age; and the mere delivery of a discharge, signed by the deceased, of a debt which Alexander owed him, only raised up an implied discharge, which the law does not hold sufficient. Besides, this discharge was never accepted of by the respondents, in the true meaning and sense of an abandonment of Alexander Hog's claim to legitim, but merely as a document of debt on the estate, and the acknowledgment signed by the assignees and Alexander, related merely to the custody of the instrument, and nothing more. They were therefore entitled to claim Alexander Hog's share of the legitim.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

“ My Lords,

“ This cause came before your Lordships by the appeal of Rebecca

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Lashley, and her husband, Thomas Lashley, for his interest, complaining of an interlocutor pronounced by the Court of Session, in an action of multiplepoinding, in which her brother, Thomas Hog, was pursuer.

“The circumstances of the case are these:—Roger Hog, the father of the appellant and of Thomas Hog, died in 1789. Soon after this event, an action was raised by the appellants against the respondent, Thomas Hog, as heir to his father, as representing him in some one or other of the passive titles known in law, and as universal intromitter with his goods and gear, stating, that he was indebted to the pursuer, Rebecca, in the sum £15,000, as her share of the goods in communion at her mother’s death, as one of the executrices of her mother, (this part of the summons is at present under the consideration of your Lordships in another appeal.) It states also, that he was indebted to her in the further sum of £15,000, as her share of the means and estate of her father at his death, together with interest on these two sums, from the date when they ought to have been paid, till payment.

“Thomas Hog’s defences were, that the claims were barred by the rational and ample provisions made by the father in favour of the appellant and his other younger children, which were accepted of by them.

“Mrs. Lashley claimed, as one of the six children of her mother; but she claimed the whole of the legitim at the death of her father, suggesting or insisting, that all the other children had discharged their claims. In his defence, Mr. Hog put on record his belief, that the other children had renounced, but at same time insisting, that the benefit of such renunciation accrued to him; and he contended that Mrs. Lashley also had renounced her legitim. He insisted on the points also in which Alexander Hog was interested, viz., that any claim of legitim was excluded by the trust deed of settlement executed by the father in *liege pousie*. That the effects in England were not liable to any claim of legitim; that, with regard to the effects in Scotland, the renunciation of the children must operate in his (Thomas’) favour, and that the father was domiciled in England at the time of his wife’s death. These, as also the consequence of the father having invested a considerable part of his personal property in the name of his son, are the subject of argument in the other depending cause.

“On the 2nd December 1790, the Court pronounced an interlocutor, finding that Mrs. Lashley’s claim of legitim was not barred by any thing done by her, and remitting to the Lord Ordinary to hear the parties upon the effect of the discharge of the legitim by the other children.

“It is difficult to conceive that Alexander and his assignees did not know of this decision.

“On the 7th of May 1792, a judgment, in an appeal by Thomas

the decision of the Court of Session, was pronounced, affirming interlocutors, which settled, that the renunciations of the other children operated in favour of the appellant, Rebecca; but leaving uncertain what was the amount of the personal estate which was subject of the claim. This involved questions of too great magnitude to receive an early decision; and, indeed, with regard to some of them, I may now observe, that they are not very likely yet to be decided.

Mr. Hog, *bona fide*, understood that all the other children had assented, and also, that Mrs. Lashley herself had renounced. In consequence of the affirmance of these interlocutors, many of the questions, which were interesting to the other children, as well as Mrs. Lashley, came to an end.

The assignees of Alexander Hog now thought proper to make a submission, by saying, that he (Alexander) was entitled to legitim, as well as Mrs. Lashley; and, in consequence, they raised the same question of action, insisting that he had done no act in the lifetime of his father, nor since his death, which could bar the claim. Thomas Hog instituted thereupon an action of multiplepinding, saying, that he was ready to pay the whole free personal estate to any person who might be found entitled to it, when its amount should be ascertained; but that he was likely to be harassed by the several parties claiming it, viz. Alexander and his assignees, Mr. Lashley, his wife, and also his creditors, who arrested the funds in Thomas's hands. The Court of Session, on the report of Lord Dregg, pronounced an interlocutor, declaring Thomas liable only in a single payment; (the point on which all multiplepindings rest), finding also, that Alexander had not discharged his claim. And, in a reclaiming petition, the Lords adhered. The issues between the parties being now conjoined with the multiplepinding, this appeal is now brought to determine the question of Alexander's right to legitim.

At first, only the assignees of Alexander were called as respondents. But it occurred to some of your Lordships, that it was doubtful whether it would be right to proceed without the presence of Thomas Hog, as a question might arise, Whether the Court of Session could act in contradiction to the judgment in the former appeal, which adjudged the whole legitim to Mrs. Lashley? This doubt arose in my mind, from thinking that a multiplepinding resembled a proceeding by bill of interpleader in this country; as here, if Rebecca Hog stated in a proceeding in the Court of Chancery, that only one of the children had not discharged, and if Thomas had admitted on the record, and on that admission a decree had been founded, regarding the whole subject matter to the plaintiff, it would have been very difficult to overturn such decree. Or put the case thus: creditor for £10,000, due from the estate of a person deceased, and that he was the only creditor of the deceased, and the executor

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admitted the averment, and that he had assets wherewith to pay it— if a decree were pronounced in consequence for payment of the debt, whether it were paid or not paid, what would be the result of a claim by another creditor? If it were paid, no other creditor could call on that creditor for a participation of the sum recovered; but he would have his claim against the executor. If it were not paid, and the executor should pay any other part of the money to any other creditor, the first creditor might still, nevertheless, insist for the whole, and no bill of review could be brought. He should have made the usual inquiries for creditors. I cannot leave this part of the case without noticing, that though some of the judges of the Court of Session expressed their surprise that there could be any doubt of the propriety of the judgment in the case of the multiplepounding, I yet think that very considerable difficulty hangs about it; and I know that a noble and learned Lord, now near me (Lord Thurlow) concurs in that opinion.

“ With regard to the transaction of Alexander with his father, during the father's life, and of himself and his assignees since his father's death, in a suit between the brother and sister, I should hold, on the principles of the doctrine of election, that Alexander had renounced. The claim of Alexander for legitim was not made till the cause between Thomas and Rebecca was finished, though he and his assignees knew that they could make such claim. Under these circumstances, what is the effect of the transaction before and after the father's death?

“ During the lifetime of his father, circumstances occurred which raise a considerable question, whether he was not barred during the life of his father. If not, they will be of weight in viewing the later transactions which took place.

“ It was stated, in the Court of Session, that the assignees had acted properly in not saying a word till the case was over. One judge, indeed, wondered that there was a different opinion in regard to this notion. When I mention the circumstances of the case, you will see that this was not a mere acquiescence, but in some degree a case of election. What would have been the consequence had the money been paid out of the hands of the executors? Or, is it morally fit or proper, that one child should take benefit at the expense of another, while struggling perhaps with poverty? Would you suffer the assignees, without having provided for the expense, to benefit by the expense of Mrs. Lashley? Will you not rather consider this in a moral point of view, as evidence of the understanding of parties?

“ On 29th November 1768, Roger Hog wrote a letter to Alexander, telling him, he intended to pay up his patrimony, without interest, ‘ which,’ he says, ‘ is the sum I always allotted to you.’ On 31st Dec. 1768, Alexander executed a discharge of the sums received

s the *portion bestowed on him* by his father. He was only a minor at this time. The entries in Roger Hog's books cannot be evidence of anything; and it is obvious they were no evidence against the daughter, Rebecca.

"On 1st March 1779 and 1st September 1780, Alexander obtained two loans of £2000 each, making £4000, from his father, for which he granted bonds in the English form. On 30th December 1783, Roger executed a deed in which, after reciting these bonds for love, favour, and affection, and other weighty causes, he resolves, in lieu of provisions, to discharge these two bonds, declaring that this should be in full of all legitim, &c. This discharge he kept in his own hands, and it was found in his repositories at his death. On the question, Whether Alexander had discharged the legitim in Roger's lifetime, I am of opinion that the fact of the father's executing this discharge amounts to a demonstration, that he could not mean that the discharge of 1768 amounted to a discharge of the legitim. For these reasons, there is no ground to say that the legitim was barred in the lifetime of Roger Hog. Indeed, Roger's proving the bonds as debts on Alexander's bankrupt estate in England, is proof of a demand of 20s. in the £; and if the bankrupt receives his certificate, the payment of the dividends on his estate is full payment of the debt; for a man proving under a statute of bankruptcy, forgoes all other modes of payment than that under the statute, so as to destroy all other remedies for payment.

"Having received the first dividend, Roger Hog died; on this event, it is to be supposed that these assignees, as representing the bankrupt, the son of a Scotsman, would have a general knowledge of the rights of the bankrupt; and, among others, his claim on his father's estate. It was their duty to have examined whether he still retained these rights. But the matter does not rest here. They received, *in gremio* of the father's discharge for the £4000, information that the child of a Scotsman had a claim, unless he had disposed of it in the lifetime of the father. For, at the father's death, his son, Thomas, very properly, and in the due execution of his duty, informed the assignees of the existence of the instrument, and sent it to them. Not only was the attention of the assignees, but also of the bankrupt, drawn to this deed; for when the discharge was carried to him by Mr. Robertson, the agent of the family, and put into the possession of Thwaytes, he gave a receipt for it, which states that it is subjoined to an 'exact copy' of the discharge. He who stated the copy to be exact, could not but know the contents of the deed. Alexander wrote that he approved of this receipt at the bottom of it. They who transmitted this discharge, must have considered that Alexander's claim was thereby barred. There is great anger in allowing persons, who have no interest in the subject in dispute, to be plaintiff in a multiplepinding, raised for the purpose of ringing forward claims like this. If Mrs. Lashley had failed in

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obtaining the legitim, I cannot but apprehend that we should have had a probability of seeing more of the circumstances of the case than are now before us; if Alexander had started up and said he did not discharge, though Mrs. Lashley has: pay *me* the legitim. Though it has therefore hung on my mind that a multiplicity of proceedings in cases like this, yet there is another danger much greater, and that is, to get rid of authorities.

"But this matter does not rest on the understanding of Thomas alone, but also on that of the assignees. They understood, after they had received the discharge, Thomas, as executor of Roger, had no right to any future dividends, as he no longer was as a creditor on Alexander's estate, and they therefore paid the dividends among the other creditors, passing him over.

"It is matter of astonishment to me, that there can be any doubt that, in making this bargain, they agreed to take the dividends in lieu of the legitim, rather than speculate on its uncertain amount, being at the same time in doubt whether, independent of the discharge, Alexander would have been able to sustain his claim to the legitim. And there was nothing to prevent their making such a bargain. If this had been a question in the Court of Chancery, before the election, and dealt with for three years together, they would have been bound by it. But they say they were at liberty to do this; if the dividends amounted to the legitim, well and good, if not, they come to the charge, that they were entitled to demand more. By all our books, however, they are not so entitled; and, in many cases, it has been decided by my predecessors, that this amounts to an election. If it is not clear that this was an imprudent act on their part; if the Court had held that the law of the *status* was to rule the distribution, and, of course, all the property in the bank that was not liable to claim of legitim, the claim would have been very small indeed. It was even a doubt whether Alexander had not discharged in his father's lifetime. Besides, it is not material, in a case of election, to inquire whether they made an improvident bargain or not, it is sufficient that they made it with deliberation.

"Put the case, that Roger Hog had died insolvent as to every thing but Alexander's debt, after the assignees had applied the assets, would Alexander have afterwards said that this contract was not an election?

"I have always been clear upon this point; but having been counsel in this cause, nothing but necessity should have obliged me to decide it. But even now, I act on the deliberate and well weighed opinion of another noble and learned Lord" (Thurlow.)

It was ordered and adjudged, that the interlocutors complained of, in so far as they find that Alexander Hog's claim of legitim was not cut off during the life of his father, be affirmed; and that the said interlocutors be reversed.

so far as they find that Alexander Hog's claim of legitim was not cut off by what passed after his father's death, and in so far as they sustain the said claim. And it is hereby declared and found, that the assignees of the bankruptcy of the said Alexander Hog were competent to release such claim, and that it appears, by facts proved in this cause, that they have released it. And it is further ordered and adjudged, That as to the rest, the said interlocutors be affirmed. And it is further ordered, that the cause be remitted back to the Court of Session to proceed accordingly.

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For Appellants, *Wm. Alexander, J. Clerk, Geo. Cranstoun.*
For Respondents, *Ed. Law.*

NOTE—A separate appeal and cross-appeal on other points of the succession was heard for five days, but adjourned to next Session, (1803); and then again adjourned to Session (1804).—*Vide infra.*

[Mor. App. 1. Royal Burgh, No. 6.]

THE INCORPORATION of FLESHERS of the CITY of EDINBURGH,	} <i>Appellants;</i>
THE LORD PROVOST, MAGISTRATES and TOWN COUNCIL of the CITY of EDINBURGH, }	
	<i>Respondents.</i>

House of Lords, 24th June 1802.

BURGH—PETTY CUSTOM—RIGHT TO LEVY—USAGE.—The Magistrates of Edinburgh had a right of exacting dues on all cattle brought into the market of the House of Muir. The fleshers of Edinburgh were in use to resort to that market, and bought the cattle, which they brought into Edinburgh for the purpose of slaughter and consumption. As buyers at the House of Muir market, they stated that they enjoyed an exemption from the duty leviable on cattle brought into Edinburgh. But when the House of Muir market ceased to be resorted to, and the graziers and owners of cattle sold to the fleshers directly, without resorting to any market, the magistrates then changed their mode of levying these dues, (without consent of the legislature), by laying the custom upon all bestial brought into Edinburgh, whether for the purpose of being there *bought* or *sold*, or for the purpose of being *killed* and *consumed*. In a suspension by the fleshers, combined with a declarator by the magistrates: Held, that the magistrates were

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entitled so to levy the dues. Altered in the House of Lords, as to find, that it did not appear by the proofs made in this case that the magistrates had any right to exact any other dues than those they had exacted previous to this change in the mode of levying them; and case remitted for further consideration.

The right of the Magistrates and Town Council of the City of Edinburgh to levy duty or custom on all cattle brought into Edinburgh by the fleshers being disputed, the Magistrates brought the present action of declarator against the Incorporation of Fleshers, to have it found and declared, "That the said custom is due and exigible on all bestial, whether oxen, sheep, calves, or swine, or others, brought into the city of Edinburgh, or the liberties thereof, as well as to the public markets of the *House of Muir* and *sheep flakes*, whether for the purpose of being there bought or sold, or for the purpose of being there slaughtered or consumed within the said city and liberties; and that if the said custom is not paid in the said public markets, it must be paid whenever the carcass is so slaughtered, or otherwise disposed of, within the said city and liberties; and it being so found and declared, the defenders, and all others bringing cattle into the said city and liberties, for sale or slaughter, or buying, selling, or slaughtering them there, ought and should be decerned and ordained, in time coming, to make payment of such duty accordingly, in all cases where the custom has not been previously paid by the seller in the public markets of *House of Muir* and *sheep flakes*."

The summons further concluded to prohibit the butchers from possessing grazings above the extent of one acre, in terms of the act 1703, and also for discharging them from intercepting cattle coming towards the public markets belonging to the city, which they were in the practice of doing, and thereby forestalling and depriving the magistrates of their duties; and concluding, that if they did so, they should be liable in the penalty exigible from forestallers. This action was conjoined with a suspension. In defence, it was stated that originally the right so conferred upon the magistrates was derived from Lord Abernethy. That, as then conveyed, it was a right of holding markets at the *House of Muir*, seven or eight miles from Edinburgh, and of levying the small dues and customs thereat on all cattle brought for sale. That the act of Parliament 1661, which ratified this right, did not extend it, but only ratifies and approves

" the privilege of uplifting the customs at the said *House of Muir*," and " discharging all his Majesty's subjects of keeping any market places at the Bridge House Knowes, or any other place near the said House of the Muir, but to bring all their goods to be sold at the said House of Muir." From this duty, however, the defenders (appellants) maintained, that they, as a corporation of freemen fleshers, were exempted, although all other buyers in the market were liable. The black cattle were all taken to the House of Muir market, to which place the butchers resorted to buy their bestial for sole consumption in the city ; but at this time the sheep were brought into the sheep flakes in Edinburgh. The market, however, at the House of Muir, from various causes—the improvement of agriculture,—the convenience of the public, and of farmers and graziers, ceased to be resorted to. The farmers and graziers about Edinburgh sold their cattle at once to the butchers, without resorting to any market. or if they did, chose another market than the House of Muir. This gradual change in the House of Muir market was greatly disadvantageous to the incorporation of fleshers in Edinburgh. In place of finding their commodity at a market, at which no duty was exacted from them, they were under the necessity either of sending round the country to purchase from farmers or graziers, who had fattened their cattle for the market, or to go to markets at a greater distance. The change was also disadvantageous to the magistrates of Edinburgh, inasmuch as it deprived them of the duties which they had been accustomed to draw at the markets of the House of Muir. This was a loss, to which the magistrates, it was stated, were necessarily exposed, like any other proprietors of a market. At the same time, the revenue of the town had been increased in another respect, for the great increase in the consumption had raised the flesh market custom to a great extent. While matters stood thus, it occurred to the magistrates that they might still preserve the revenue which they had formerly drawn from the market ; though now totally deserted, by exacting upon all cattle brought into Edinburgh, wherever bought, though at different markets from the House of Muir, the same duties which had been paid by those persons who had formerly frequented that market.

With this view, they published a table of customs in 1776 ; which is titled, " Rectified Table of Custom on Bestial, payable at the House of Muir, and sheep flakes, for all sorts of cattle brought thither by sellers, freemen, and unfreemen."

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The appellants, therefore, contended, that since the magistrates' right was confined to exact dues at the House of Muir, they had no right to exact upon all cattle brought into Edinburgh, so purchased in the country, and at other markets than the House of Muir and sheep flakes.

In reply, the magistrates admitted, that formerly the freemen fleshers of Edinburgh were exempted from the duties exigible from the buyers at the market of the House of Muir. But the reason of this former exemption was, that the duties in question were then paid by persons who sold the cattle, which made it unnecessary to impose any duty on the freemen who bought them; and as it was now impossible, on account of the market being deserted, to levy the custom from the sellers, it was argued that the buyers, whether freemen or not, were liable.

It was also stated by them, that their right to levy the dues was supported by a charter from King James VI. (1636), which gave them right of holding public markets. And, 2nd, Of levying petty customs which they had been in use to levy. They also referred to Maitland's History, to show that they had been in long use and wont to hold markets at the House of Muir and other parts, and exact dues. The respondents, therefore, denied that their right to levy this custom on cattle was derived from the Saltoun family. Because, long prior, and in 1477, they had such a right, and long prior to the contract of excambion between the magistrates and Abernethy of Saltoun, while, in point of fact, the right of holding market was never in that family, so as to entitle them to convey it; and the best proof of this was, the excambion itself, which shows that the right of market was never in the Saltoun family.

June 18 and 19, 1799. The Lord Ordinary reported the case to the Court on informations. Whereupon the Court pronounced this interlocutor, "Repel the reasons of suspension: Find the letters orderly proceeded, and decern. And, in the declarator, find the pursuers entitled to the duties libelled, and decern and declare accordingly: Find the defenders liable in the expense of extract, but in no other expenses, and decern."

Dec. 18, 1799. On reclaiming petition, the Court adhered, and remitted to the Lord Ordinary to hear the "parties further upon any privileges claimed by the freemen, and to do as he shall see just."

Feb. 25, 1802. The Lord Ordinary ordered informations on this last point, and reported to the Court. Whereupon, the Court found,

"The freemen of the incorporation of fleshers liable in the duties in question; repel the reasons of suspension; find the letters orderly proceeded, and decern."

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The respondents having purchased from Lord Abernethy of Saltoun, the right of holding markets and levying custom at the *House of Muir*, cannot be entitled, in consequence of the desertion of that market, to levy the dues payable there, upon all the cattle brought into Edinburgh, and neither bought nor sold at the House of Muir, unless it can be shown that the authors of the respondents, the family of Abernethy, had a right to the duties which the respondents are here demanding. Now, it is not pretended that such right belonged to the Lords of Saltoun, or could have been exercised by them. In whatever manner the respondents acquired right to levy customs at the House of Muir, such right could no longer exist after the market was deserted, and recourse had to others, and the magistrates had no right, on this event, to impose other duties in their room. Their right extended no farther than to exact duty at the House of Muir; and, as even then, the corporation of fleshers, as freemen, were exempted from such duty, *a fortiori* must they be exempted from the custom which is imposed in its room and stead.

Pleaded for the Respondents.—By charters in favour of the magistrates, they are clearly empowered to levy certain petty duties; and although some of them do not point out the nature and amount of these customs, nor the articles upon which they are to be levied, but refer to the ancient use and wont, yet it is clear that they have been in the immemorial use and wont of exacting custom on live cattle purchased in the neighbourhood of Edinburgh. This custom was exacted at the House of Muir. It was also exacted at the sheep flakes held at the Grassmarket, within the town. Before they acquired the right to the market of the House of Muir from Lord Abernethy, therefore, they levied a petty custom upon all cattle sold in the Grassmarket, or any other public market in the vicinity of Edinburgh. And the act 1661 confirmed and made that right more effectual than before. Consequently, having enjoyed this right, independently of the right acquired from Lord Abernethy, beyond the memory of man, it must be presumed to be founded on legal authority. When the butchers of Edinburgh, how-

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ever, gave up purchasing at public market, evidently for the purpose of evading the duty, the question was, Whether the magistrates had a right to levy the same petty custom upon every beast slaughtered in Edinburgh; or upon the carcase when brought to sale within the city and its liberties? The magistrates submit, that in laying this duty on the carcase in place of the animal when alive, is not substituting one duty for another; but is levying the precise same duty upon the very same article, although, from various circumstances, it is not now purchased as formerly. Besides, the grant of a public market to a burgh, with a custom exigible, necessarily implies in law that the dealers in commodities exposed at that market shall frequent it, or that, if they do not choose to do so, that they shall pay the same duties which would have been levied from them there. This principle of law is acknowledged in *Lawson, Aug. 5, 1768. Jardine & Co. v. Thomson*, tacksman of a meat market, where it was found that a duty granted on what was sold at the market place was not to be eluded by selling in private houses and warehouses. So in the case of the city of Glasgow. The butchers were in the habit of going to these markets, but they now found it their interest to go to the country and intercept the very cattle that are intended for sale in the Edinburgh market, and therefore are justly liable to be charged the duty on the carcase. Nor is it any answer to say, that it was only unfreemen fleshers who were liable to duty at those markets, because freemen as well as unfreemen, as is shown by the tables of duty, were liable; and an indulgence was only given to the latter class when they bought at the House of Muir market, but no further.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

“ My Lords,

“ The present appeal arises out of certain interlocutors pronounced by the Court of Session, in a suspension brought by the incorporation of butchers against the magistrates and their tacksman, of the duties of the House of Muir and sheep flakes, and an action of declarator brought by the magistrates against the butchers.

“ The suspension complained of certain duties imposed by the magistrates in lieu of their old market customs, set out in what was called a certified table in the year 1776, (read the purport of the suspension).

"On the other hand, the respondents brought their action of declarator, to ascertain their right to the duties in question. Their summons is founded on a charter in 1636, a ratification in parliament, a subsequent act of parliament in 1703 for preventing the butchers from being also graziers, and on an act of parliament against forestallers. (Here his Lordship entered into a detail of the summons).

"The first conclusion in the summons is, that the duty is exigible on all bestial, whether the cattle be oxen, sheep, calves, or others, brought into the city of Edinburgh or the liberties thereof, as well as to the public markets of the House of Muir and sheep flakes, whether for the purpose of being there bought or sold, or for the purpose of being slaughtered or consumed; and that all cattle, &c. brought into the city shall pay custom if they had not previously paid it in their markets. It is one thing to pray in a declarator that an individual butcher, in Edinburgh, shall only buy at the markets in question; but it is a very different thing to say, that if he buys cattle at other markets, they shall still pay the toll for the Edinburgh market.

"It then goes on to pray, that the table of fees should be enforced; that table bears date in November 1776, and regulates the old table, as collected from Maitland's history.

"The old table showed the duties payable in the markets; the new table rectifies the former, so as to preserve the duties, whether the cattle were bought in the market or not. These conclusions respected the duties.

"2d. It has a conclusion that the butcher should be discharged from possessing grazings, and that their tacks should be declared void. This last was a pretty strong conclusion, as the lessors were not parties.

"3d. It concludes that the old markets should be enforced, to the exclusion of all others. 4th. It concludes for the penalties against forestalling; and, lastly, it concludes for the expense of the action.

"When I first read this record, I was very much surprised at the nature of this combination of actions. The suit brought by the appellants was as a corporation, praying that the proceedings of the magistrates should be suspended simpliciter. To a mind only practised in English law, it appears difficult to say how a corporation could support such a suit. The declarator raised at the instance of the respondents as a corporation, is against an infinite number almost of individuals, stated to be butchers of Edinburgh. Whether these form all the individual members of the appellants' corporation I have no means of knowing. Another strong difficulty here again occurs to the English lawyer. It is a perfect novelty to him to see three pages of names of individuals prayed to be found guilty of crimes of evading markets, of forestalling, &c. and convictions asked for

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penalties to be imposed. We have no means of prosecuting forestallers here but as individuals, one in each record.

"The only use that has been made of these conclusions, has been, not to do away the practices mentioned, but avowedly to preserve the custom to the respondents. It were perhaps to be wished that these practices had been done away when they first prevailed. But butcher meat being a necessary article in Edinburgh, it might tend to enhance the price very inconveniently, if these conclusions of the declarator were enforced too harshly. If all the matters of the summons can with propriety in Scotland be thus *lumped* together, we must determine the question arising according to law. The real question here is, what duties are exigible?

"The cause came to a conclusion under these circumstances. These questions only were insisted on, namely, whether the butchers, freemen or unfreemen, could be compelled to pay the duties when the markets were gone; and whether or not the duties were transferable to a different species of commodity. Upon this branch of the cause the judgment solely proceeded." (Here his Lordship read the three interlocutors appealed from.)

"There was a good deal of reasoning in the printed papers to show, that it was mercy to proceed in this manner against the butchers, as they were liable to penalties, forfeitures, and incapacities; and that therefore they ought to pay a toll which was in itself stated to be reasonable. In my opinion, all this must be laid out of the case; if the respondents wish to do away forestalling, &c. let them do so. But it is impossible to contend that if they forbear to this, they are entitled to demand toll for their forbearance. If compelling the observance of any of these statutes compels the butchers to reinstate those markets, that is an accidental consequence of law by which the duties may be increased. Another question is, if the respondents have a right to call upon the appellants to buy exclusively in those markets; it may follow, or it may not, (for this is a question upon which I am not to give any opinion), that the seller of the cattle is obliged to pay the duty as formerly.

"The question is, if the Court is right in saying that the appellants are liable to pay the duties, because the sellers in the deserted markets were obliged to pay them. This was not the toll which was formerly demandable. It must be upon one of two grounds that the Court found this; 1st, That by reason of evasion, in the nature of a fraud on the appellants' part, the respondents were entitled to demand from them the duties that would otherwise have been paid at the markets. Or, 2d, That the respondents had, by virtue of some ancient custom, a right thus to tax his Majesty's subjects.

"In this country, we do not concede to his Majesty the right of granting tolls on things not brought to market. If established markets are evaded, it is damages, not toll, that can be demanded.

"It is a matter of surprise to me that so little proof has been

adduced here. Several charters have been argued from which were not produced in Court, and of which I can say nothing. Maitland's history also was referred to, but that was no evidence. In this country, if a right of toll be in question, we examine witnesses as to usage. No usage was proved here. No witnesses were examined. The respondents do not pretend to say that the new duties were ever demanded before the date of the rectified table in 1776. I must make an exception as to calves and swine; and the appellants say that they never dealt in these.

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"I do not think it necessary to enter into any discussion of the rights of the Saltoun family (Lord Abernethy). I may observe, however, that if the freemen butchers could have brought cattle into Edinburgh, which had paid duty to the Saltoun family, while the market belonged to them, without paying duty to the city also, it goes a great way to establish that they may bring cattle into Edinburgh now, purchased at other markets, without paying duty to the city. His Lordship fully aware that the ex-cambion shows that the market never belonged to the Saltoun family, (Note by Mr. D. Robertson, the Solicitor in the case.)

"What is the reason of a grant of market tolls?—the convenience surely of the grant of a particular spot, both to buyers and sellers. It follows, of course, that toll is only due upon cattle exposed at market. All grants of toll are confined to this. Other individuals are prohibited, under penalties, from violating markets held under an exclusive claim.

"It was contended also, that the city of Edinburgh, having a right to levy petty customs, had a right to levy the toll in question. (Here his Lordship read the claim in the charter 1636 as to the petty customs). Petty customs are also well known in this country; they must be shown either to be founded in charters or usage. We must show what these customs were. Apply this rule to the present question; does any usage here prove that the respondents have a right to levy this as a petty custom? If the corporation have a right to say, because we have lost a toll we shall impose a new custom in its stead; that is a different matter. My opinion is, that no words in any charter produced to us, show that the town of Edinburgh has a right to impose this by a new law.

"The respondents referred to a decision where the magistrates of Glasgow had been found entitled to impose a duty upon potatoes in 1786; and to another, where the magistrates of Edinburgh had been found entitled to market duty on fruit, though sold in shops, in 1790. As to the last decision I shall say nothing, not wishing to prejudice it, and as, in fact, I know nothing of the grounds on which it proceeded. Ferguson v. Magistrates of Glasgow, June 29, 1786. M. 1999. Stewart v. Magistrates of Edinburgh, June 1, 1790. (unreported.)

"As to the Glasgow case, the respondents say that it was by virtue of the clause as to petty customs that it was imposed. The appellants, however, state that the city of Glasgow was specially empowered to impose the custom.

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" I do not see, in any view, how toll can be demanded but as toll. In my opinion, it is impossible to contend successfully, that, because the seller of a live ox to the butcher at a public market, was liable to payment of a certain toll, that when such markets are deserted, *not the seller, but the butcher*, who buys, shall be liable to pay the old toll leviable on such seller. The only reason given for charging the buyer is, that he does not now put the seller to the trouble of bringing his cattle to market.

" What I have said does not apply to the conclusions of the libe as to forestalling, penalties on farming, upholding the markets, &c. As the Court has said nothing as to these, I shall not say any thing to prejudice these topics. Your Lordships' judgment should be confined to a single point, as was the judgment of the Court below. I have to propose a variation upon that judgment, remitting the cause to the Court of Session, not prejudicing the claims of the respondents, if they can be grounded upon other rights."

LORD THURLOW,—

" I have no objection to send back the cause, as here proposed though I came to the House with an opinion that the judgment should be reversed *in toto*.

" Nothing is stated in this record but that certain charters were granted, and acts of parliament made. As to the absurdity of the conclusions of the summons, I shall only say this, that I conceive that the city of Edinburgh have shown right to a market to be held three times a-week, and to the tolls thereof; but if they insist that the duties are payable on all cattle brought into the city, they give themselves a perpetual market.

" I hope it will be conveyed to the Court of Session, that when the cause comes here again, as I conceive it will come, I trust it will be specified in the record, what duties are really to be demanded, from what description of persons, and upon what distinct grounds. On this record, I defy any man, either lawyer or layman, to say on what the judgment is founded."

Ordered and adjudged that it does not appear, by the proof made in this cause, that the respondents are entitled to any other duties than such as they had been accustomed, previously to the time of publishing the rectified table of customs mentioned in the pleading, and bearing date in November 1776, rightfully to receive, or to demand the said duties from any other persons than such as had previously thereto been accustomed to pay the same, or in any other cases of buying or selling than those in which they had previously thereto been accustomed rightfully to receive

the same. And it is further ordered that the said cause be remitted back to the Court of Session in Scotland, to review their judgment respecting the letters of suspension, and the conclusions of the declarator.

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For Appellants, *Wm. Adam, Ad. Gillies.*

For Respondents, *Edw. Law, Arch. Campbell, jun.*

JOHN MORTHLAND, Esq., Advocate, and } *Appellants*;
JOHN JOHNSTON, Printer in Edinburgh, }
JOHN CADELL, Esq. of Cockenzie, - *Respondent.*

House of Lords, 26th June 1802.

DAMAGES FOR PRINTING AND PUBLISHING A LIBEL—VERITAS CONVICTI—RELEVANCY—PROCESS.—1. Held that a letter, addressed to a person in Edinburgh, giving an account of a riot and disturbance at Tranent, and reflecting on the respondent's conduct therein, as one of the Deputy-Lieutenants of the county, and which was brought to the Scots Chronicle, and published, was a libel, and £300 of damages awarded to the party. (2.) Held not relevant to charge one of the defenders, who was alleged to be editor, "as legal adviser or abettor of that paper, or as held, or believed and understood to be concerned in it." (3.) It was objected that here there had been no actual proof of the publication of the letter in the newspaper adduced. But this objection was repelled. (4.) The *veritas convictii* of what was stated in the libel pleaded, but the defence was not sustained. (5.) Objection was stated to the summons, on the ground that, three weeks after it was served, a new summons was raised and signeted, and to which, as was alleged, there was affixed the date of the first summons, and this, it was alleged, was done in order to remedy a defect in that summons. Held the objection not good.

This was an action of damages brought at the instance of the respondent, for a libel published in the Edinburgh newspaper called the Scots Chronicle, of which the appellants were alleged respectively to be the editor and publisher.

It appeared, that on the occasion of the passing of the militia act in 1797, for embodying a militia force in Scotland, the preparation of the lists of the persons liable to be ballotted was thereby devolved upon the schoolmasters and constables of the different parishes, subject to the correc-

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It was stated by the respondent, that on their way to an inn in Tranent, where this meeting was to be held, they were grossly insulted by a very numerous assembly of men and women, who had been brought together in some measure by beating of a drum through the adjoining villages of the preceding evening. The respondent, in particular, was repeatedly threatened with personal violence; and one of the mob was heard to call out to him, that they would have his heart's blood. Notwithstanding, however, of these threatenings, they ordered the cavalry to retire from the place of meeting, and to take post at the extremity of the town.

The Deputies then proceeded to complete the correction of the lists of two of the parishes; several objections to the names upon which, were sustained, and the excuses of several persons accepted, after judicial examination.

The examination of the lists of the third parish had commenced, when a paper, it was alleged, of a most seditious and incendiary nature, threatening violence in case the magistrates proceeded further, was presented to the meeting. The bearer of this paper having been dismissed only with a reprimand, a general assault was immediately commenced by the mob, with stones and broken bottles, which were thrown with great violence through the windows in the room where the magistrates were assembled, and which obliged them to fly for refuge to different parts of the house. The cavalry, which was then called to assist the constables in protecting the door, having been repeated

driven back, and every endeavour made to dissuade the people from riot, the Riot Act was then read, and the mob duly warned of their danger, by the respondent himself, at the imminent peril of his life, it at length became necessary to give the cavalry orders to fire upon them. The consequence of which was, that several persons lost their lives. In a day or two afterwards, the following letter appeared in the Scots Chronicle newspaper :

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“ Letter from a Person at Tranent to his Wife in
Edinburgh.”

“ Dear Wife.—This comes to acquaint you, that you need
“ not weary for my return home, for my sister is to be
“ buried this afternoon at 4 o'clock, and I cannot come away
“ till I see her decently buried. I am sorry to inform you
“ of the cruelties that were committed here yesterday.
“ There were six persons shot dead on the spot, of which
“ my sister was one, and she was shot within the door of a
“ house in the town. The number of wounded is not yet
“ ascertained ; but I am just now informed that fifteen dead
“ corpses were this morning found in the corn fields, and it
“ is not known how many more may be found when the
“ corn is cut, as the Cinque Port cavalry patrolled through
“ the fields and high roads to the distance of a mile or two
“ round Tranent, and fired upon with pistols, and cut with
“ their swords, all and sundry that they met. Several
“ decent people were killed at that distance, who were
“ about their lawful business, and totally unconcerned with
“ what was going on in the town. I am informed that this
“ was unprovoked on the part of the people ; for they as-
“ sembled peaceably by public intimation from the Lord
“ Lieutenant and his Deputies, to state their objections, if
“ they had any, to the roll ; but when they presented their
“ petitions and certificates, they were totally rejected, espe-
“ cially by Mr. Cadell, who told the people he would re-
“ ceive none of them, as they were determined to enforce
“ the act ; and as the people insisted to be heard, he, with
“ his own hands, pushed them from the door ; upon which
“ some boys and women threw several stones at the win-
“ dows. The assistance of the cavalry was immediately
“ called for, and ordered to charge sword in hand ; and
“ then followed the bloody business above related. But
“ my hand can scarcely hold the pen longer to give you any

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 "Tranent, August 30th."

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Such was the statement of the respondent. The appellant, John Johnston, on the other hand, stated, that on the 31st of Aug. 1797, there was delivered at his printing-office a general account of the events at Tranent, written with apparent temper and candour; and its truth being confirmed by many concurring reports, the appellant resolved to print it on the day following, Sept. 1, being the next day in course of publishing his newspaper. That on the evening of the same day (31st August) Archibald Rodger, a tradesman and housekeeper in Edinburgh, accompanied by three of his neighbours, called at the appellant's house, and showed him a letter he had written to his wife, the day before, from Tranent, (whither he had gone to attend the funeral of his sister, who was unfortunately killed there), giving an account of the behaviour of the people, of the Deputy Lieutenants, and of the military on the 29th. Accordingly, in the Scots Chronicle published on the day following, there was inserted the foresaid general account of the transactions at Tranent, and also the letter above mentioned, altered in such a manner as, in the appellant's apprehension, to be harmless and inoffensive to any person. And the chief fact laid hold of in the general account printed in the Scots Chronicle was, that a number of innocent people, when peaceably travelling on the high ways, or busy in their occupations of husbandry in the fields, at the distance of one or two miles from Tranent, and totally ignorant of what passed there, were attacked and killed by a party of dragoons who attended the Deputy Lieutenants on that occasion. A few days after, a different account of the transactions appeared in the other Scotch papers; and in about three weeks thereafter there was published in all these papers a libel, in which the Scots Chronicle was called an *infamous paper*, and the account of the affair given by it *false* and *scandalous*. Amidst these strong expressions no exception was taken to the above letter, and no insinuation dropped of any improper imputation as against Mr. Cadell. And in the investigation under the authority of the Court of Justiciary it was established by the precognition, that the account given in the paper was an extremely mitigated one. It was further stated, that it was his intention to publish the letter, by omitting the name of Mr. Cadell, mentioned in it, but being called off to attend the Sheriff, he was pre-

vented from doing this, although, on his return to the office, he ordered his name to be expunged from the remainder of the paper still to be thrown off.

The original letter mentioned Captain Finlay along with Mr. Cadell, but in that published Captain Finlay's name was omitted, and Mr. Cadell's alone published.

These being the facts, it was further alleged, in the defences given in, that the summons of damages was raised by Mr. Buchan, not on the employment of Mr. Cadell, but on the employment of certain persons in the county of Haddington. But thereafter a new summons was raised by Mr. Cathcart, Mr. Cadell's son-in-law, at the distance of three weeks after the date and service of the first, to which, it was alleged, was affixed the date of the first summons. It was carried to the signet office for the signet. The officer there asked if the first summons had been served? the clerk replied it had not, which was contrary to fact, he affixed the stamp to the new summons as of the date of the old. And it was therefore maintained that the new summons was false in two respects, 1st. In its date of signing; 2d. In its date of signeting; and that the old summons was cancelled. The defences also called for production of every paper on which the pursuer founded in his libel, but the Lord Ordinary found it unnecessary in *hoc statu* to produce these. The defences, therefore, besides the defence of *veritas convicti*, stated objections to the summons so raised, and the Lord Ordinary, in considering these, of this date, repelled "the first defence" pleaded for the said John Johnston, as to the calumnious nature of the action; and, before answer as to the other defences, ordains the said John Johnston, defender, to give in a special condescendence of facts he avers in support of the fourth article of his defences."

The appellant having represented against this interlocutor, and a report being lodged from the keeper of the signet, as to the practice in regard to signeting summonses in such cases, the appellant presented an additional petition, contending that the report was confined to the issuing duplicates of the same summons, and, consequently, could not apply to the present case. The Lord Ordinary took the case to report to the Court, who pronounced this interlocutor, July 3, 1798.

"Repel the objections to the action, adhere to the Lord Ordinary's interlocutor, and refuse the desire of both petitions; renew the order on the defender, John Johnston, to give a special condescendence of the facts he avers and offers

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Mar. 7, 1798.

1802. " to prove in support of the fourth article of his defence
 " and appoint the same to be printed, and put into the
 NORTHLAND, " boxes on Friday next, the cause to be advised on Satu
 &c. " day or Tuesday next, with or without condescendence."
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The appellant obeyed this order, and put in a condescendence of the facts above related, and which were offered to be proved. Considerable debate then ensued upon the relevancy of the facts so stated to go to proof, particularly with reference to the excesses of the military, although it was stated in the summons that his account of those excesses was false, and inserted for the purpose of aggravating the libel against the pursuer.

July 11, 1798. The following interlocutor was pronounced :—" The
 " before answer, allow the pursuer a proof of his libel and
 " condescendence, and to the defenders a conjunct probation;
 " and the question having been put by the Court :
 " the counsel for the defender, John Johnston, whether he
 " demanded a proof of the 4th article of his condescendence
 " with its subdivisions, as connected with, or applicable to
 " the conduct of the pursuer, Mr. Cadell; and his counsel
 " having declined to make any explicit answer to the
 " question, but insisted that his client was entitled to prove
 " the whole articles of his condescendence, whether imputable
 " to Mr. Cadell personally or not. The Lords did
 " further allow the defenders to prove articles 1st, 2d, and
 " 3d of their condescendence, and allow the pursuer a conjunct
 " probation thereanent; and refuse to allow any proof of the
 " 4th article, with its subdivisions, nor of the 5th article, which
 " are not explicitly stated as applicable to the pursuer—(this was
 " the conduct of the military); and grants commission to the
 " Sheriffs Deputes of Edinburgh and Haddington, or either of
 " them, to take the said proof at Edinburgh and Haddington,
 " any of the lawful days at Edinburgh and Haddington, any of the
 " lawful days at Edinburgh and Haddington, any of the lawful days
 " the ensuing vacation," &c.* The proof was led.

* Opinions of the Judges on point of Form.

LORD PRESIDENT CAMPBELL.—" I am of opinion that the objections, in point of form, are of little importance. The cause ought to have gone to proof before now upon the summons, for it is quite clear that duplicates of such summonses are usual in practice, and it seems admitted that there was a regular summons duly executed. This is sufficient. None but the party himself could afterwards discharge it. If it was unduly cancelled, the tenor may be proved."

In all these proceedings Mr. Morthland denied that he was the proprietor, editor, and publisher of the Scots Chronicle; and, in the course of the proof, having discovered that the pursuer, Mr. Cadell, and others employed by

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But this is not necessary. By the old forms, even a blunder could be altered; and still is so in the Admiralty Court.

"The cause, therefore, ought to go to proof. The pursuer must be allowed a proof of this libel in common form, and the defenders a conjunct probation. The defenders are likewise entitled to a proof of their defences, in so far as pertinent to the cause, and allowable in such cases."

LORD ESKGROVE.—"I am for repelling the objection."

LORD MEADOWBANK.—"I am of the same opinion."

LORD ARMADALE.—"There is a danger of substituting one summons for another."

As to the *Veritas Convicii*.

LORD PRESIDENT CAMPBELL.—"It has been often disputed, whether the proof of the *veritas convicii* be allowable. In England there is a distinction made between the criminal or penal prosecution *ad vindictam publicam*, and the civil action of damages. In the former, no proof is allowed to justify the words spoken or written. It is considered merely as a breach of public police; and it is equally an offence, whether the facts be true or false. But, in the latter, which is for reparation of a damage to the individual, it is held to be *damnum absque injuria*, if the facts be true, and the party is not entitled to reparation. In either case, a wicked and malicious intention must be set forth. *Vide* Termly Reports, vol. iii. p. 428; and act 32 Geo. III. c. 60.

"With us, for a long time, and indeed till very lately, we stuck by the doctrine of the civil law, that *veritas convicii non excusat*, whether the action was of a civil or of a criminal nature, and therefore, in the case of Hamilton against Rutherford, in 1771, the Court, upon very full argument, refused to allow a proof of the bribery imputed to the pursuer. Mor. 13924.

"In later cases, however, the Court has been disposed to adopt the English practice; see Dict. vol. iv. p. 230. The two cases of Chalmers against Douglas, 22d February 1785,—affirmed in the House of Lords; and Peat against Smith, 6th March 1793, support that state of the law. *Vide ante* vol. iii. p. 26. Mor. 13941.

"Perhaps the Court went a little too far, in the case of Chalmers, by going back into the history of the lady's conduct at an early life. But the case of Peat against Smith seems to have been well decided; and the Court did not indiscriminately allow a proof of the *veritas*, but made distinctions. See the interlocutors. Mor. 13941.

1802. him or his agents, had been guilty of practices apparently
 NORTHLAND, tending to influence or tamper with the witnesses, the ap-
 &c. pellants presented a petition and complaint to the Court;
 v. but the Court found "neither the facts charged, nor those
 CADELL. "acknowledged, are sufficient to bar any further procedure
 Dec. 21, 1799.

"In the present case, the defenders have not yet stated precisely what they offer to prove upon this head, (*veritas convicii*.) They cannot be allowed to prove against third parties, unconnected with pursuer; *e. g.* supposing it had been said in the letter, that one of the persons killed was a young lady, who was with child to a person not her husband. Some such thing was thrown out in the case of Peat; but a proof of it was not allowed.

"The circumstance of the pursuer saying in his libel, that the letter complained of was false and malicious in general terms, is nothing to the purpose. The falsehood and malice will be presumed, if nothing to the contrary appears. The proof lies on the defenders, to justify their account in publishing this attack upon the conduct of a public officer, by justifying the act of publication as lawful, and, *inter alia*, by proving the truth of what is there asserted, so far as it applies to the pursuer, Mr. Cadell, or to his conduct in the premises. But so far as it does not apply to him, it is out of the cause altogether, and resolves into a charge against third parties, who are not here to defend themselves.

"But the defenders may so state their allegation as to make it apply to Mr. Cadell, and to entitle them to a proof of it; thus they may, in their defences *in causa*, or in their answers to the condescendence, state pointedly that Mr. Cadell, acting as a Justice of the Peace, and Deputy Lieutenant, did, without any just reason, call for the aid and assistance of the Cinque Port Cavalry, and did give orders or directions to the commanding officer to cause his men fire upon the persons then assembled, or attack them sword in hand whereby a number of innocent persons, who were not engaged in any tumult, nor doing any harm at the time, were put to death, and Mr. Cadell thereby did in effect commit murder, which is the crime insinuated against him in the letter first published.

"The defenders therefore ought immediately to state in writing what they offer to prove, and if the Court, upon considering it, shall be of opinion that it comes within the proper description of *veritas convicii*, it will allow the defenders a proof of their defence, and the pursuer a conjunct probation relative thereto.

"But the cause having been too long delayed already, the pursuer is entitled to have an act and commission for proving his libel, in order that the proof may go on during the vacation, although the defenders should not be ready to state pointedly what they undertake to prove in defence, so far as the *veritas convicii* is concerned."

“ in this action ;” but superseded consideration of the petition *quoad ultra*.

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&c.
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CADELL.

The fact stated in the letter, that “ when the people presented their petitions and certificates, they were totally rejected, especially by Mr. Cadell, who told the people he would receive none of them, as they were determined to enforce the act,” was disproved. It was proved that Mr. Cadell offered to receive every petition and certificate brought forward, and, in point of fact, did receive these, and a great many were struck off the lists.

On the other hand, it was proved by others that Mr. Cadell had struck at several of them with a stick—had cried, “ knock them down,”—had rejected some petitions and certificates,—had used violent and harsh language ; and had ordered the military to act against the people, upon being violently attacked by them. The defender Northland, on the proof, pleaded that it had not been proved that he was connected with the Scots Chronicle, at the time libelled, either as editor, proprietor, or publisher of the paper ; and that on no other ground could he be held liable for the publication.

The Court pronounced this interlocutor : “ Find that the letter published in the newspaper called the Scots Chronicle, dated 1st September, and complained of by the pursuer, was, and is a false, calumnious, and injurious libel against the pursuer : Find it not relevant to charge the defender, John Northland, as the legal adviser or abettor of that paper, or as held, believed, and understood to be concerned in it ; but find the charge against him contained in the libelled summons and condescendence relevant in other respects : Find it sufficiently instructed and proved that the said defender, John Northland, was, at the first establishment of that newspaper, the only ostensible proprietor, conductor, and editor thereof ; and although, at subsequent periods, John Lawder and Robert Paul, who have been engaged by him as clerks in the printing office, were prevailed on successively to assume the ostensible name and character of sole proprietors of the paper, in certain bonds granted by them to the stamp office, yet the said John Northland still continued, down to the days of the publication complained of, to take the general direction and superintendence of that newspaper, in the same way as before ; and the interest and concern which he originally had in that business, for himself and others his employers, never did truly cease, or undergo any material al-

June 17 and
20, 1800.

1802. "teration: Find it sufficiently proved, as well as admitted,
 "that the other defender, John Johnston, was and is the
 NORTHLAND, "printer of the said newspaper, and also concerned in the
 &c. "publication thereof: Repel the defences pleaded for both
 v. "defenders: Find them jointly and severally liable to the
 CADELL. "pursuer in damages. Modify these damages to £300
 "Sterling, and decern: Find them also liable in ex-
 "penses."*

* Opinions of the Judges on the Merits.

LORD PRESIDENT CAMPBELL.—"1st.—The first question is, Whether the publication is defamatory, that is, amounts to a libel, or not?

"Little doubt can be entertained as to this. The whole letter must be taken together, and not a few words picked out from one part of it, signifying only that petitions were refused,—or "ordered to charge sword in hand," &c. &c.

"The object in view is plain; and he who takes it upon him to publish and circulate such a paper, is an enemy not only to good order, but to the liberty of the press itself, which cannot exist if so abused.

"In the letter's original state, the blame was divided between Captain Finlay and Mr. Cadell, but the former was left out, probably because the publishers were afraid that he might resent it in a different way than by an action at law. But they seem to have considered the pursuer as fair game, and the letter evidently ascribes to his conduct, all the consequences which ensued that day.

"A more heinous injury cannot be conceived against a magistrate, acting in his public official character. The very corrections made on the letter show that the publishers went deliberately to work. The leaving his name blank in some of the copies makes little difference, as the description, at any rate, included him. The object was to hold him up to resentment of all the lower classes of people, who were then inflamed to a degree of frenzy against the militia law.

"It is not necessary that any specific damage should be proved. The law of Scotland gives damages in such a case in name of *solatium*, and here they ought to be exemplary.

"The next question is, Who are the parties liable?

"Johnston the printer, makes little defence, except one, which aggravates the injury, by insisting on the *veritas convicii*. The witnesses adduced upon this head were among the rioters, and have given a false and exaggerated view of the matter. It is clear from the depositions of Major Wight and Mr. Gray, &c., that the pursuer conducted himself with propriety; that the calling for the assistance of the military was unavoidable; and that the unfortunate consequences which ensued were imputable, not to the pursuer, but to those who instigated and encouraged the riot.

Thereafter the Court resumed consideration of the petition and complaint, and found, "In respect it is admitted
 " by Mr. John Cadell, that upon the occasion mentioned
 " in the complaint, he said to Mrs. Kedgley, she had been

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 June 21, 1800.

" Johnston seems willing, if the above defences are overruled, which they must be, to make himself a sacrifice in this cause, for he seems to admit even a greater share of responsibility than he probably had. He gives himself up, not only as the printer, but the sole editor; which last character he might perhaps have divided with others.

" As to Mr. Morthland, he is variously described in the summons and in the condescendence. Some part of the description given to him in the former, seems not relevant, but the designations of proprietor and editor are relevant; and articles 3d and 4th of the condescendence, where he is said also to be conductor, director, manager, and superintendent, are likewise relevant. These last words are indeed no more than amplifications, or further explanations of the preceding epithet, viz. *editor*.

" Johnston, in his Dictionary, makes this term synonymous with publisher. The one is the Latin word, the other the English. He who prepares a work for publication is literally the editor; and this seems to be nearly the same thing with publisher. The act 38 Geo. III. c. 78, § 28, seems also to consider them as synonymous.

" That Mr. Morthland set out as the editor or chief person concerned in the publication, or, as one of the witnesses calls him, the chief man in the Chronicle office, is made out by his own letters, p. 176, &c. and during the whole time that Lauder was in the office. Johnston himself swears that Lauder was unfit to be an editor, and therefore took a great deal of assistance from Mr. Morthland. He says, that after Lauder was dismissed, and Paul introduced as proprietor, he, Johnston, became the editor or compiler of the paper; but admits that he got some assistance from Mr. Morthland for a month or two, though his name was given up as the sole editor in the stamp office. He seems desirous it should be understood that Mr. Morthland ceased to be an assistant editor, just immediately before the Tranent business, yet we find him continuing to take an active concern as to the books, and receiving the London newspapers and letters, &c. all along; and it is an awkward circumstance, that we find him in the printing office, at the very moments of the publication.

" Mr. Morthland appears to have become more cautious of appearing in any distinct character, as connected with this publication; and therefore the name of editor is given to the printer, whose salary of £100 was not thereby increased; and the name of proprietor to another clerk in the office, whose situation was even subordinate, and with a salary only of £52.

1802. " guilty of perjury when examined as a witness ; find that
 " his having done so was highly improper and censurable,
 MORTHLAND, " and the complainers were justifiable in bringing the com-
 &c. plaint : Find Mr. Cadell liable to the complainers in
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" The pursuer of this action, which is a mere civil action of damages on account of a defamatory libel, and which does not require the same strictness of form that a criminal action would do, had no occasion to give any other description to the defenders, than merely that they were concerned in the publication of the abuse complained of. It is no matter, whether as proprietor, printer, editor, publisher, conductor, or in any other way ; it is sufficient that they are art and part in the publication, or accessory to it in any shape.

" In the present case, there is much contrariety in the parole evidence, so far as Mr. Morthland is concerned, owing partly to the prejudices of the witnesses on the one side or the other. It is therefore extremely difficult to pronounce what was Mr. Morthland's precise situation with respect to this newspaper, but not difficult to see that he took an active concern in it, if this be thought sufficiently relevant, and sufficiently within the terms used in laying the action. The proprietor of a paper may be an infant ; but the manager of a paper is more clearly liable. At the sametime, the proprietor is also responsible for the general conduct of his paper."

LORD MEADOWBANK.—" Suppose he had been trustee for the subscribers, the truster would be liable for the conduct of the business under him, and for the debts contracted on account of it."

LORD CRAIG.—" What if a vessel was run down, and that the ship which did the damage was a smuggler, and sent out under ostensible names ? I think Morthland liable."

LORD BANNATYNE.—" I doubt as to his responsibility. I doubt if the property ever was in Morthland. There is no evidence of that, and nothing but suspicion. The character of editor stood in Johnston. And the terms art and part are not enough to subject him in liability. If his assistance was merely voluntarily and occasional, such as happens almost in every paper daily, by persons in other respects no way connected with it, is he to be held liable ? I cannot assent to that proposition."

LORD GLENLEE.—" Morthland's liability is the natural result of what he himself admitted. The original subscription goes into his hands ; and he is the employer of Paul, &c., for the benefit and behoof of his constituents. If he has a control over the management, this is enough. The case of Innes, who fell into the pit, is an illustration."

LORD CRAIG.—" On reconsideration, I think the libel a scandalous one as to Johnston ; but I doubt whether Morthland be liable. Constructive proprietor is not sufficient."

"expenses, which they modify to fifteen guineas, decern
 "therefor, and for the full expense of extract; and further
 "find and amerciate Mr. Cadell in the sum of ten guineas,
 "to be paid to the collector for the poor."

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Jan. 27, 1801.

The appellants reclaimed against the interlocutor in the principal cause, but the Court adhered.

Against the interlocutors in the principal cause the appellants brought an appeal to the House of Lords.

Pleaded for Mr. Johnston.—The original summons in this action was cancelled and suppressed, in the manner that has

LORD ARMADALE.—"I incline to be of the same opinion. Certain parties must be responsible; but, in the case of a ship running down another, the owners are liable, though ignorant, and innocent of the injury done, just because they are the owners, and so responsible; but here it is different. Others appear as the avowed editor and proprietor. If we depart from the actual publication of this letter, we must fix the full character upon him from which we infer responsibility. In the case of a vessel, would the interest that creditors have upon a respondentia bond make them liable? Suppose such a creditor on board—suppose he is one personally at the helm—or one that writes in the log book, would these make him liable?"

LORD HERMAND.—"The real evidence here is to be attended to, and that evidence connects Morthland in such a way as makes him liable."

LORD JUSTICE CLERK.—"I am of the same opinion."

LORD ANCKERVILLE.—"I think the case altogether one of trifling circumstance. The letter innocent and inoffensive"

LORD BALMUTO.—"It is clearly a libel, and Morthland liable, as the chief manager of the paper."

LORD CULLEN.—"We should have had more light on the law of the case. Vide Buller's *Nisi Prius* Cases. I think Johnston clearly liable, but there may be circumstances in mitigation. 1st. There is no *animus injurandi*. 2d. He softened the expression, in publishing the letter. The word Cadell was underscored in the original. As to Morthland, I have doubts. Why did he not call Paul in the summons? Summons too loose, and an undue degree of latitude taken. It was the pursuer's duty to be more precise. I think there is no evidence of property in Morthland."

LORD MEADOWBANK.—"This is clearly a libel. Both defenders are liable. It may be that the claim of property in Morthland is not made out, and that the claim as manager is scarcely sufficient; but the real ground is, that the true proprietors are concealed behind."

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been stated; after which, it is humbly thought, that the action, or instance necessarily fell to the ground. The action can proceed without a writ of summons, and when the writ is purposely vitiated, cancelled, or destroyed, by the pursuer himself, nothing remains to which the defendant can be compelled to make his answer or defence.

After the parties have gone to issue in Court, if an accident happens to the writ of summons, or to any other paper, the appellants do not conceive such accident to afford ground for abating the action; though, in that case, it is always in practice necessary to prove judicially the tenor and contents of the writ so accidentally lost, by an action proving the tenor. But here the pursuer cancelled, vitiated, and abandoned his original summons altogether, and totally departed from his action proceeding on that summons.

It is true, the respondent produced a certificate from John Hume, substitute keeper of the Signet, "that it has been the uniform practice to issue from his office, a duplicate or more copies of any summons previously signetted upon production of the signetted summons; the duplicate or other summons being of the same tenor as the first signetted summons." But these duplicates here alluded to are used where there are several defenders, each duplicate being a warrant for citation. They are only warrants for future citation, and do not apply to citations already given. The duplicate in this case was resorted to for the purpose of concealing a defect in the original summons. But even supposing it is competent for an action to proceed upon such duplicate, yet, as that very duplicate was *vitiated in date*, and falsified in the signeting, by putting the date of the signing and signeting to the original summons, which had been executed three weeks before, it was equally invalid and inept. No doubt no trace of the original summons is to be found on the records of the signet—a fact curious enough—although by an express regulation this is enjoined. But it has been decided by several cases, that the inserting a false date, *ex proposito*, renders the writ null. Yet, notwithstanding this, the Court of Session repelled the defences on this head, and sustained the instance. 2. On the merits, the appellant maintains that no legal evidence of the publication of the newspaper founded on in the summons is yet produced. The Lord Ordinary and the Court seem to have thought that it was sufficient to prove and produce the said paper in the course of the process, though not along with the summons, in the regular way, and in terms of their

own act of *sederunt*. But their Lordships did not go the length of saying, that a pursuer had no occasion to prove and produce the writing he founded on at all. The respondent, however, stands in this singular predicament, of having come into Court with a summons, which, according to all the forms of judicial procedure hitherto known and observed in practice, is *funditus* void and null, and has been allowed to proceed to an ultimate decision, without producing and authenticating the writing narrated in his summons. Besides, the words above quoted from the letter, which are said to have been libellous, do not import a slanderous charge against Mr. Cadell. They do not infer any reproach, and consequently are not actionable.

But if these facts imputed to Mr. Cadell shall be held to import a slanderous charge against him, the appellant then insists upon the *veritas convicii* as a valid defence, and humbly maintains that the facts made out in proof of the actual conduct of the pursuer at Tranent, are more than sufficient to justify the statement charged as libellous.

3. But supposing that the matter of the letter was actionable, and the appellant has failed to prove his defence of *veritas convicii*, yet, he contends, that his conduct in printing the letter was not done in *animo injurandi* towards Mr. Cadell; and if there was no *malus animus*, it is clear in law that no action lies. Here the facts were notorious. It was a public event as well as a public calamity, and such as fell within the notice of newspapers.

Pleaded for Mr. Morthland.—1. The interlocutor of the Court, besides sustaining much irrelevant matter, is not founded on the evidence adduced. The respondent has entirely failed in his attempt to prove the appellant to be either the proprietor, editor, or publisher, of the Scots Chronicle; or ever, either directly or indirectly, to have received profit or emolument therefrom; and notwithstanding the many disadvantages with which the appellant had to struggle in the course of his proof, he has clearly established that the rights and functions of proprietor, editor, and publisher, were exclusively vested in and discharged by other persons, at periods both prior and subsequent to the publication complained of; excepting the above characters, and that of printer, the appellant has never heard of any situation or connection with a newspaper inferring general responsibility for its contents; and to these specific heads the proof, in this case, ought to have been restricted.

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2. The uncertainty and looseness of the proof is wholly imputable to the respondent. This is a civil action, pursued by an individual claiming a sum of money on account of an alleged offensive publication. Exclusive of the author, Messrs. Paul and Johnston were the persons indisputably and avowedly responsible for that publication, the former being the known and avowed proprietor and publisher, and the latter, the known and avowed printer and editor of the said newspaper. The pursuer, therefore, seeking merely pecuniary redress, if a *bona fide* litigant, had a strong and manifest interest to direct his action solely against those who were avowedly responsible; against whom, if the grounds of his claim were relevant, he would obtain a decree for his money without further delay or expense of investigation. The pursuer, however, has thought proper to pass by the known author of the letter, and the avowed proprietor and publisher of the newspaper, and to single out a person standing in no such situation; and therefore, as was in such a case to be expected, the designations in the summons are not only irrelevant, but cannot apply to him, namely, "Editor or proprietor, legal adviser, and abettor of, or otherwise held, believed, and understood to be concerned in conducting, printing, and publishing of the said periodical paper called the Scots Chronicle." Of the whole of these, the pursuer has been allowed a proof without limitation. The Court, besides subjecting the appellant to go into this proof of irrelevant matter, foreign to the issue, has given the pursuer an opportunity of prosecuting inquiries into the appellant's conduct, and into the whole history of his domestic life, during a course of years. Notwithstanding all these, the attempt of proving his connection with the paper has completely failed. On the contrary, the testimony of Mr. Johnston and John Webster, depones, that during the years 1796, 1797, and 1798, the appellant never gave any instructions regarding the printing of the paper nor did superintend the press.

Pleaded for the Respondent.—1. The letter inserted in the newspaper, called the Scots Chronicle, on the 1st September 1797, was a false, calumnious, injurious libel upon the character and conduct of the respondent, and most peculiarly aggravated by the period and circumstances of its publication. 2. The appellant, John Johnston, was the person who, under no one circumstance of excuse and alleviation, printed, or caused to be printed and published, the

newspaper containing the said libel. 3. The appellant, Mr. Morthland, was originally the sole and only real, as well as ostensible proprietor, editor, and conductor of the newspaper called the Scots Chronicle; and that the substantial right and interest which he had in all and each of these characters, in relation to that newspaper, never truly ceased and determined, down to a period subsequent to the publication of the 1st September 1797, which contained the libel in question; or, at least, because he stood in such a situation in regard to it, as to be in law completely responsible for the whole contents of that newspaper at the above mentioned period of its publication.

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After hearing counsel,

It was ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be, and the same are hereby affirmed.

For the Appellants, *Wm. Adam, John Clerk, Chas. Moore.*

For the Respondent, *Wm. Alexander, David Boyle.*

NOTE.—Unreported in the Court of Session.

SIR W. A. CUNYNGHAME, Bart., Hon. WM. BAILLIE of Polkemmet, ANDREW BUCHANAN, ANDREW GILLON of Wallhouse, and Others, } *Appellants;*

JOHN ALEXANDER HIGGINS, W.S., Assignee for the Hon. HENRY ERSKINE, the Hon. WM. HONYMAN of Armadale, one of the Senators of the College of Justice, the Representatives of Sir JOHN INGLIS of Cramond, Bart., and for seven other Trustees of the Edinburgh and Glasgow Turnpike, } *Respondent.*

House of Lords, 26th June 1802.

TRUST—ROAD TRUSTEES—POWERS TO BORROW MONEY—RELIEF.—

In the construction of a turnpike road, under an act of Parliament, it became necessary to borrow money upon the security of the tolls. It was objected, by some of the trustees who had authorized the borrowing of money, and had attended the meetings in regard to the roads, and done other acts in the execu-

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tion of the trust, that they could not be held personally liable for the money borrowed as individuals, but only the tolls. Held the Court of Session, that as the trustees, in order to construct the roads, were obliged to borrow money on the security of the tolls and on their own credit, and as the defenders (appellants) were members of the meetings, and, as such, gave their concurrence in appointing committees, with powers to enter into contracts to construct these roads, and afterwards homologated the contracts and agreements entered into, for carrying these into execution, they were liable in relief for their proportional share. In the House of Lords, the case was remitted for reconsideration, with indication of opinion expressed, that the interlocutors appealed from were wrong; that mere presence *per se* at a meeting of road trustees, held under the act, could not make a trustee liable as an individual, but only *qua* trustee; and that presence at meetings, which authorized things to be done not within the powers of the act, could not subject in liability, unless the individual expressly came bound as an individual; and that a majority of trustees, so binding themselves individually, could not also bind other co-trustees, who did not so bind themselves, though present at the meeting.

The road trustees, in executing the turnpike road between Edinburgh and Glasgow, under their act of Parliament, were empowered to borrow money for the construction of the road, on the security and credit of the tolls.

At a half yearly meeting of the general body of trustees, the borrowing of certain sums was duly authorized, for doing which certain trustees were named as a committee, with power to enter into contracts and agreements as to the construction of the road. Before the act was applied for, the three first named gentlemen, for whom Mr. Higgins acts as assignee, had become personally bound for £3500; and afterwards they, with seven other trustees, being the committees so appointed, bound themselves as trustees, as well as personally, in the several bonds granted for the sums so borrowed. The committees being invested with powers to enter into contracts, did accordingly enter into the same. The sums borrowed for these purposes, and the nature of these transactions, were regularly brought under the notice of the general body of trustees at their meetings, by whom they were approved of, and consequently homologated.

The act limited the powers of borrowing money to the sum of £10,000, for the purpose of making the roads, which being exhausted, the trustees, instead of going to Parliament for further powers, authorized further sums to be

red beyond that amount. One of the bonds for £2000, 1802.
the trustees signing it, not only as trustees. but also
individuals, their heirs and executors. The other bonds CUNYNGHAMR,
ally ran thus:—" We, a quorum of the trustees, ap- &c.
ted by act of Parliament, bind and oblige us, conjunctly v.
severally, and our heirs, executors, and successors HIGGINS.
tsoever, to content and repay," &c. ; and some of them,
bind and oblige ourselves as trustees foresaid, as
as individually, our heirs, executors, and successors."
tolls having become insufficient as a security for pay-
of the sums borrowed, and the respondent's constituents,
signed the bonds as trustees, having bound themselves
ally, as well as trustees, they sought relief against those
trustees who had not signed the bonds, but who had
rred in authorizing the entering into contracts for mak-
e roads and the borrowing of money, or who, at least,
present at the meetings when such were authorized.
ppellants were among those of the latter class, who,
oment they heard of an intention to make them per-
y liable, declined, with the exception of one, thereafter
end any of the meetings. An action of relief hav-
een raised, to compel them to pay their propor-
share, they resisted, stating the following general
re, "That a trustee named by a general turnpike
who merely attends a meeting, and has his name
ked in the sederunt book, is never understood to bind
self individually, but only to subject the tolls, or other
luce of the trust, in payment ; and persons advancing
ey, and contracting to perform work for behoof of the
t, under the act of Parliament, if they are not satisfied
the security of the trust fund, they must either de-
e any dealings with the trustees, or must take care to
late and obtain, in aid of the security of the public
, the collateral security of any particular trustees
may be willing, either from motives of private inter-
or public spirit, to step forward and promote the work,
inding themselves personally in any particular obliga-
, as very commonly happens in the borrowing of money
urnpike roads. But though such trustees did super-
their own personal obligation, it did not follow that
he other trustees, who did not so become person-
bound, was liable in relief to them ; but such trustees
alone their relief on the security of the tolls, or other
t funds."
ere were, besides, some preliminary objections as to

1802. the calling of some of the defenders in the action, but the
 CUNNINGHAME, &c. having been repelled,—the Court, on the merits of the case
 v. pronounced this interlocutor :—" The Lords having heard
 HIGGINS. " counsel for the parties, resumed consideration of the cause
 Dec. 12, 1799. " and having advised the same, they find it proved by the
 " minutes referred to, that the trustees assembled at meetings
 " held under the act of Parliament, for making roads
 " in question, appointed committees of their number
 " with power to enter into contracts and agreements relative
 " thereto, in consequence of which, and of the contracts
 " and agreements thus entered into, a great expense
 " was incurred, which made it necessary to borrow considerable
 " sums of money upon the credit of the tolls, and upon
 " the private credit of the pursuers, find that the pursuers are
 " entitled to a proportional relief from the other trustees
 " called as defenders in this action, who were members of
 " these meetings, and as such, either gave their concurrence
 " in appointing committees, with powers to contract
 " as aforesaid, or afterwards homologated and approved
 " of those contracts and agreements entered into for carrying
 " the said resolutions of the general meetings into execution,
 " and remit to the Lord Ordinary to proceed accordingly."

Feb. 18, 1800. On reclaiming petition the Court adhered. Afterward
 May 14, — the Lord Ordinary pronounced this interlocutor,—“ Having
 “ considered the interlocutor of the Court, of 12th December
 “ last, ordains each of the defenders to state, in a special
 “ condiscendence, the particular circumstances in which he
 “ alleges he does not fall under the findings of the
 “ said interlocutor.”

Against these interlocutors the present appeal was brought to the House of Lords, reserving all special defences competent to them as individuals, should the cause go back to the Court of Session. And the appellant, John Young, admitting, that besides being present at several meetings of trustees, and being appointed a member of several committees upon branch roads connected with the trust, he signed several contracts relative to these branch roads, and gave bonds for borrowed money, and, consequently, admits liability, so far as these actings, voluntarily incurred by him are concerned; but denies it *quoad ultra*.

Pleaded for the Appellants.—1. Trustees under turnpike acts, and other trustees or commissioners appointed by act of Parliament for the discharge of a public trust, and management of a public fund, if they keep within the bound

of their official duty, cannot, by acting merely in discharge thereof, incur any personal debt or obligation whatever. This the appellants submit to be a clear proposition upon the general principles of law, and which is confirmed and supported by the tenor of all the statutes commonly called Turnpike Acts; and, in particular, both by the words and meaning of the act of the 32d of the king, for making the road in question, under which the appellants acted. Unless, therefore, it could be shown that the appellants have gone beyond the limits of their official character and duty, and either directly bound themselves as individuals for the expense of making this road, or for money to be borrowed to defray that expense, or by acting beyond or contrary to their duty as trustees, have done something that would in law raise such an obligation, no personal claim can lie against them on account of this road. The respondent, so far from pointing out the specific obligation, does not even allege any thing more against the appellants, than mere official attendance at certain public meetings of trustees, held under the act of Parliament for transacting the public and official business of the trust.

2. The claim by the respondent against the appellants is, for relief of bonds granted for money borrowed on the credit of the tolls, in which his constituents had become sureties for the trust funds, by binding themselves personally in the said bonds. There is no other question at issue between the parties but this, Whether they were, or he, in their right, is entitled to such relief from the appellants and other acting trustees? Upon the bonds themselves no such claim arises. The bond creditors assuredly have no claim against them, who did not become bound in these bonds, neither as trustees nor as individuals. If, therefore, the principal creditors have no claim, far less have the sureties. The money was borrowed upon the security of the tolls; the trustees who signed the bonds adding their own personal security; and, in this respect, therefore, they must be viewed in the character of sureties seeking relief. Accordingly, the Court, by their judgment, has not found the appellants liable upon the bonds, but on a different medium altogether. It is not the trustees who were present at meetings, which authorized the taking up of money upon bonds, or approved of the bonds when reported to them, that are found liable, but only the trustees who were present at meetings, which authorized or approved

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the entering into contracts or agreements relative to the making the roads. The trustees who had no interference except in authorising the borrowing the money, or approving of the bonds when granted, for the money borrowed are absolved from the action, which clearly shows that the Court below held it impossible that any claim could lie personally against the individual trustees on these bonds. The tolls were the main security for borrowing money. Added to this, certain trustees chose voluntarily to supply add their own personal security, they must abide the consequence, without any relief against those who did not so. They are, therefore, neither entitled under the bond nor as in right of the contractors, to make such claim against the appellants. Nor is there any evidence to show that they concurred in appointing the committees, or in approving the contracts, though their names may appear in the roll of members of meeting; and those of them who signed the contract were, by the tenor thereof, not taken personally bound to the contractor.

Pleaded for the Respondent.—The act of parliament obtained in 1792, for making this road, authorized the trustees therein named, to carry the purposes of the act into execution, but it provides no fund for the undertaking. The £10,000 which the trustees are authorized to borrow upon the tolls, was not a fund for making the road, because no money could be borrowed upon the security of the toll until after a road was made; and, at any rate, the sum of £10,000 was admitted by all to be inadequate for making the road. 2. The road was a private concern *quoad* the expense of making it. Accordingly the trustees entered into contracts with workmen and others in making the road and into bargains with the proprietors of the ground occupied by the road, in which transactions their own personal credit was necessarily pledged; some of those trustees notwithstanding, pledged their credit, by subscribing the contracts and other writings, and the rest of them by authorizing and giving their unqualified approbation to these contracts while they well knew the expense that would be occasioned thereby. 3. And it was further understood, through the whole course of the business, that all the trustees were be equally liable for the expense of the undertaking, not only those who, by the appointment and with the approbation of the different meetings, came under obligation to third parties on account of the undertaking; but those who

concurred in, or approved of, or homologated such appointments or obligations. 4. It therefore follows that these bonds, having been granted to defray the expense of the work, a debt is thereby created against the whole of the trustees; and those who advanced the money for carrying it on, or granted their bonds for the money which was so applied, have a right to be relieved by their co-trustees.

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After hearing counsel,

LORD CHANCELLOR ELDON said,*

“ My Lords,

“ This matter comes before your Lordships on an appeal from the Court of Session in Scotland, on certain interlocutors, which respectively bear date on the 12th Dec. 1799 and 18th Feb. 1800, and also an interlocutor of the Lord Ordinary, which bears date the 14th May 1800; and, my Lords, this cause arose out of certain acts that had been done by the appellants, or some of them, and the respondents, or some of them, in the execution of an act which passed both Houses of Parliament, for the purpose of making a road in several parts of Scotland, which it is necessary I should state, in order to make myself understood by your Lordships. The trustees appointed for carrying this act into execution are thus described in the act, ‘ That every person who is at present, or shall be at any time, after the commencement of this act, in his own right, or in the right of his wife, in the actual possession and enjoyment of lands valued in the tax rolls of one or other of the counties of Linlithgow and Lanark at 100 pounds Scots of valued rent, and lying in any of the parishes through which the aforesaid roads do or shall pass, as heritor, proprietor, or liferenter, and all and every the eldest son, or heir apparent of any heritors or liferenters, the provost or first magistrate of the cities of Edinburgh and Glasgow, and of the royal burgh of Linlithgow respectively, and the Sheriffs-depute of the counties of Lanark, Linlithgow, and Edinburgh, who had an interest merely for the year which they continued in office, but who, at the same time, are trustees by office, shall be trustees for opening, making, amending, and repairing and keeping in repair, the roads and bridges aforesaid, and otherwise putting this act into execution, provided always that only one person shall act and vote as a trustee upon one qualification of 100 pounds Scots, and that the person enjoying the greater interest in the lands shall be preferred.’

“ The act of parliament gave these parties a power to raise money, but ‘ upon the credit of the tolls to arise in virtue of

* Mr. Gurney's Short-hand Notes.

1802. this act, in such manner as they shall think proper, any sum or
 sums of money, not exceeding £10,000 Sterling, at an inter-
 CUNYNGHAME, not exceeding the legal interest for the time;’ and it gave a po-
 &c. ‘ to the trustees, or any five or more of them assembled, at
 v. first meeting to be holden in virtue of this act, or at any of
 HIGGINS. foresaid stated half yearly meetings, to assign and make over
 whole, or any part of the said tolls or duties, during the continu-
 of this act, (the charges of such assignments to be paid out of
 said tolls), as a security or securities to such person or persons
 shall advance or lend such sum or sums of money, their heirs, exe-
 cutors, or assignees, for the money so to be lent or advanced, and
 interest of the same.’ This, your Lordships will observe, relates to
 the money to be borrowed.

“ The act contains another clause, ‘ that it shall be lawful for the
 trustees, or any five or more of them, at a half yearly stated general
 meeting assembled, to contract and agree with such person or per-
 sons as they, or any five or more of them, shall judge proper, for the
 making and upholding, all or any part or parts of the said roads
 hereby appointed to be made and repaired, with power to them, or
 any five or more of them, to assign and make over to such person
 or persons, upon their giving good and sufficient security for the
 execution of the said agreements, any parts of the powers vested in
 them by this act, which shall be necessary for the execution of such
 contracts only, and any proportion of the tolls, duties, or forfeitures,
 to be taken and levied on the said roads so to be repaired by con-
 tract, and on no other, as the said trustees, or any five or more of
 them, shall appoint.’

“ With respect to these contracts for making roads, your Lord-
 ships will find that they are put upon the same footing as the other
 official acts of the trustees, by a clause which provides, ‘ That regular
 ‘ accounts of all monies received, disbursements, contracts, matters
 ‘ and things respecting the execution of this act, shall be duly kept
 ‘ and entered by the clerk or treasurer of such trustees, in a book or
 ‘ books to be provided for that purpose, and which book or books
 ‘ shall and may be inspected and perused by any of the heritors of
 ‘ the counties of Linlithgow and Lanark, at all reasonable times,
 ‘ without fee or reward.’ And as to the damages which may be
 done to the ground through which the road shall be carried, it is
 provided by the act, ‘ That the trustees shall make satisfaction to
 the owners of, and persons interested in, the grounds and heredita-
 ments through which such roads shall pass, for the damage they
 may sustain by making, widening, and altering the said roads, or
 erecting toll houses as aforesaid; and, for that purpose, it shall be
 lawful for the said trustees, or any five or more of them, to contract
 and agree with the owners of, and persons interested in such grounds
 and hereditaments, for the purchase thereof, and for the loss and
 damage they may sustain in the manner here pointed out. And if

the persons shall refuse to treat or agree, the damages shall be assessed by a jury; and with respect to the mode of paying the damages which shall be assessed, the act points out, 'That the costs and charges of every sort and kind, attending the obtaining such an assessment by a jury, shall be paid by the trustees, or any five or more of them, out of the tolls and duties arising on the said road, or from any money to be borrowed upon the credit thereof.'

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"It would be easy to read to your Lordships a great variety of other clauses out of this act. It is sufficient to state, that of those others which I shall abstain from reading, which I think I can predicate of those I have read, that the powers which the act gave, are powers vested in the trustees to do the acts which the act enables them to do, with the fund which the act provides; that is, in short, that the funds were to be applied to satisfy every demand which, in the regular execution of this trust, might happen to arise.

"My Lords, it appears, I think, that there was a sum of money,—I cannot very accurately state what it was that was subscribed, but it was between three and four thousand pounds, and, as I understand, necessarily subscribed, and the act gave the trustees a power to raise to the extent of £10,000. Your Lordships see that the trustees have a power of raising it upon the credit of the tolls. I mark that circumstance, because it is material to observe, that so long as there is a meeting under the authority of the act—a dealing under the authority of the act is a dealing with a fund, which, under the authority of that act, they have a right to dispose of; and the actings of the majority of those present will bind the whole; but it becomes a very grave and very serious question indeed, to say, that when your funds shall have been altogether exhausted, and when as to any fund they cease, under the authority of the act, to have any powers, it still shall be competent to the majority of such meeting to bind any individual not dissenting as an individual. They may overrule the whole of the co-trustees, as co-trustees, by a vote of the majority, when acting within the powers of the act; but when they came no longer to have a fund to dispose of which belongs to them as trustees, it must require, as I apprehend, the individual concurrence of the individual acting as an individual, made out by very clear and cogent evidence, in order to bind him, or make him liable personally.

"It appears that the trustees addressed themselves to the execution of the trusts of this act of parliament, and, in so doing, they held meetings, according to the provisions of the act of parliament. They formed committees according to the provisions of the act of parliament. They entered into contracts for doing the work which the act authorized and enabled them to do; and I believe I shall meet with the concurrence of your Lordships, when I say, that all these acts are *prima facie* to be taken to be acts done by them, not as individuals, but as trustees in the execution of the trusts reposed

1802. in them under the act of parliament ; and so long as they confine themselves to do acts, in that character, they will be liable only in
 CUNYNGHAME, that character. It is certainly competent to any man who is a trustee under a Navigation Act, or a Turnpike Act, if he thinks proper to
 &c. fall in love with the execution of a trust, and to embark with
 v. greater zeal in the project which the act enabled him to carry into
 HIGGINS. execution, than belongs to his real character of trustee, to pledge himself individually, if he thinks proper, to the person with whom he is to deal ;—he may make a contract with a person who is to repair part of the road ;—he may make a contract with a person who is to build a bridge ;—he may make a contract, if those are ordinarily made, with the daily workmen, to do works, which may entitle them to say to him, from the language of the contract he enters into, or from the manner in which he employs them—the terms on which he employs them—that they have embarked in the undertaking upon his personal credit ; and that if he thinks proper so to contract with them, they have nothing to do with the question, Whether he has a fund to resort to or not ; but they who so state themselves, in a question with him, are bound to make out that he did contract with them, not in the character of a trustee, but, divesting himself of that character, and making himself liable, whether he had a fund to resort to or not, and therefore as an individual.

“ There is another class of cases, from which it might well be contended, that a trustee, with full knowledge that he had no fund, and could employ no fund, and that no fund could ever be brought within his reach, to be applied, if he contract in his character of trustee, as if there were a fund ; in which case it might be said, upon the special circumstances of such case, and upon the ground of deceit, as holding out to the persons with whom he was dealing, that they might safely contract with him, and that there was a fund to which he and they could resort, that he made himself personally liable ; but still it is for them to prove, from the terms of the contract, and the nature of the engagement, that they have a personal demand upon him ; and I should think it a strong construction to put upon a great many acts of sederunt, which I find here, where they have made orders in the committee, and so on, that those orders are *prima facie* to be understood to authorize them not to act as trustees, up to the extent of their powers as trustees, but, divesting themselves of all that belongs to them in the character of trustees, that they are to be understood to be authorized to act, so as not only to bind themselves personally, but to bind other persons personally,—this appears to me to be a strong proposition.

“ Up to a certain period in the transactions of these trustees, your Lordships must have observed that the fund which was to be raised by mortgage of these tolls, was not a trust debt. When, therefore, that fund which had been raised previous to passing the act, and that fund which could be made by mortgage of the tolls, was not yet

exhausted, it is not only *prima facie* to be supposed that the trustees are dealing as trustees, from the language with which they deal, but also from the fact that they have a fund to deal upon, according to the terms of the act of parliament. It becomes, it is true, a question that may be looked at in a very different point of view, when that period shall have arrived, after which they have no such fund upon which they could deal; and having no such fund upon which they could deal, they could not be supplied with it but by personal contributions, or by personal engagements, or by a fresh application to parliament; because, when any person joins in an act done for raising money, with a knowledge, on his part, that there is no such fund, it is a case in which it is somewhat more probable that he engaged himself personally. It does not prove the fact, but, in such a case, it is somewhat more probable that he might mean personally to engage himself; but I do not know that it carries it further than that it was somewhat more probable. It is clear we cannot go on the doctrine of probabilities.

“ Now, without going through a great variety of meetings, in which persons have been present, sometimes more sometimes fewer in number,—the number of meetings in which money has been alleged to be borrowed by the trustees, previous to and subsequent to the total expenditure of these funds—without pointing out the instances in which some individuals join in securities that are given, and in which some individuals do join in contracts that are made; or the instances in which some persons individually, or together with other persons, enter into such securities and contracts, and without entering into the particularities which belong to each and every one of the securities which have been given in this case—the terms of which appear in very different and in very various language; some of the securities in which, upon the face of them, the trustees plainly bind themselves only *as trustees*; some of the securities in which the trustees bind themselves, describing themselves as trustees, but going on to bind their heirs, executors, and administrators; some of the securities in which the trustees bind themselves as trustees, and all other the trustees, having terms descriptive of their own heirs, executors, and administrators, but not having terms descriptive of the personal or real representatives of the other trustees whom they affect to bind; some of the securities, I think, affecting to bind not only themselves and their real and personal representatives, but the other trustees and their real and personal representatives also; and without entering into the question, what is the legal effect of said instruments?—whether they do bind the trustees who are described in them, only as trustees, or whether, because they name their heirs, executors, and administrators, they shall bind them personally?—without entering into the question, what is the legal effect with respect to those trustees, who are merely described as trustees by the general words, all others the trustees concerned in the execution of

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the act of parliament, or as these words can be taken to apply to any particular trustees, who were present at any meeting or sederunt that authorized the borrowing of money in the transactions to which this particular security, so expressed, applies ;—without entering into the question of law, how far it was possible for one trustee not only to bind another trustee, merely as such, but as an individual, by a bond not executed by themselves,—your Lordships will, I think, collect from these variations and differences in the terms and forms of the contracts, that the interest of those who executed the contracts might be different in different instances and circumstances. Your Lordships have, therefore, in this case, not only a class of cases which existed before the funds were exhausted,—which the act of parliament furnished, but you have a class of cases, both before and after that period arrived, in which considerable question may arise upon what must be taken to have been the intention of those who executed such securities so expressed, and whether it should seem to be probable, that those who executed securities and contracts so variously expressed, did not mean that all such securities and contracts should operate exactly in the same manner.

“ One great argument for the respondents in this case, has been, that the trustees who were present at the meetings could mean nothing else,—attending to the state of the funds, and attending to the circumstances of fact, that here there was no road which could immediately produce tolls, and that they could mean nothing else but to authorize those who dealt with the contracts and securities not only to bind themselves personally, but also to bind all those who were present at the meeting at which that authority was given. Now *that*, I think, must depend upon different circumstances.

“ The first question furnished by the case is, Whether a man's merely being present at such a meeting, authorizes that inference to be formed. The next question that may arise may be, Upon what degree of knowledge he had at the time that he was present at that meeting is he to be held personally liable ? Another question may arise, What have been his acts *ultra* the act of mere presence ? because, for the reason I before shortly alluded to, it seems a proposition I am incapable of finding a reason for, when it is stated that trustees, deriving their very existence and character as trustees under an act of parliament, can bind other persons out of a majority, with respect to funds over which they have no control as trustees, but which is the private money of those individuals in their private pockets ; and, upon such a case, were the question to arise upon the personal liability of A, B, C, D, E, and F, it would be necessary to enter into an inquiry of what was the act of A, B, C, D, E, and F. I observe that my Lord Ordinary, before whom this action first came, by an interlocutor, put it upon those who contended, that any individual trustee was liable as an individual, to show by what acts or facts he made himself so liable. When the case came before the Court of Session, they were pleased

announce the following interlocutor (Interlocutor read), and a interlocutor, together with another, afterwards pronounced by Lord Ordinary, to whom the Court of Session had remitted, has established this principle, as it seems to me, if I rightly understand at the mere presence, as proved by the minutes of the sederunt, in the personal liability of every man who was present, and not arising from the minutes to have objected to the proceeding ;—and, consequently, that he will be bound on his part to show, by acts and facts, that he was not liable—that he did protest in some such way as to alter himself from the liability which is alleged against him. I will trouble your Lordships with reading these interlocutors, under that your Lordships may see whether I have fully represented the effect of them. The first is of the 12th December 1799, (re the interlocutor read.)

Now, I understand the effect of that interlocutor to amount to that *every person* is liable, not only for every thing that was done, in consequence of the authority given by the meeting, although in reference to each, you can say no more than this, that he was present, and that he not only is liable for the proceedings of that meeting at which he was present, but that he will be liable, if he were present at a meeting to-day, for the effect and consequences of all the transactions that were authorized at all the preceding meetings, provided that, at the meeting held to-day, such notice is taken of the transactions which have been done, under the authority given by any transactions of the preceding meeting, that, by the effect of that notice at the meeting held to-day, you can connect the transactions of that meeting with the transactions authorized at the former meeting; and, by virtue of this reasoning, he is said to homologate and approve the whole of such transactions. The effect of that is, that if, at a meeting consisting of four or five trustees, the chief magistrates of the borough of Glasgow, Linlithgow, or the other places named, were gone in, if he had gone in but once, and any transaction took place at that meeting, in which four or five trustees were met, he being one of them, that therefore he homologated, as it is called, all transactions of the preceding meetings; and if he did not object or protest against that, though he was trustee by virtue of his office, but by virtue of his office only for a year, and though his presence might be occasioned by such a motive as I have been stating, he is liable to a contribution to that extent, for the extent to which he would be liable would be limited by the amount to which they had borrowed; but he might, upon that principle, be liable to a greater extent than the act had authorized the trustees, as trustees, to borrow or raise money. I do not know myself, whether there is any general understanding in the practice in Scotland, respecting those transactions which may give an interpretation to (I cannot call it the liability of persons who were accidentally present, but to) the mere fact of the presence of a person at a meeting, to this extent, that if the meet-

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1802. ing lasted six hours, and he were then only one moment, and
 CUNYNGHAME, &c. v. HIGGINS, cording to this doctrine, if he were there, and had departed two
 three hours before the consideration was taken up, whether such
 sum of money should be borrowed or not, the mere circumstance
 having entered his name in the minutes, according to the under-
 standing of these matters in Scotland, would render him liable. It
 would need a most inveterate practice indeed, upon which such a
 proposition as that could be established. It could not be the inten-
 tion of a Mayor, or Sheriff, or an annual officer, to embark himself to
 this extent. I confess I cannot myself think that there is any such
 principle in the law of Scotland (unless indeed it differs material-
 ly from the law of England) which says, that the mere presence of
 a man at a meeting would of itself render him liable; first, because
 it may have been a case in which the man may not have voted
 all; secondly, because he may have been in the minority; and, last-
 ly, because, upon the question of personal liability, it does not ap-
 pear to me how the majority could bind him. It would be prett-
 nearly the same thing, as arguing this proposition, that every one
 of your Lordships who came into this room, having his name taken
 down by your Lordships' clerk, must be understood to give his assent
 to every measure, although the true sense of that is not so. It is
 nothing more than that your Lordships were present; and, therefore,
 in this case, the man's presence is nothing more than that he was pre-
 sent. Now, upon this interlocutor, there is a remit to the Lord Ordi-
 nary, and this is the Lord Ordinary's interlocutor of 14th May
 1800. 'Having considered the interlocutor of the Court of Session
 of 12th December last, ordains each of the defenders to state, in a
 special condescendence, the particular circumstances by which he
 alleges he does not fall under the findings of the said interlocutor.'
 "My Lord Ordinary, who had this under his consideration before
 the Court of Session, was of opinion, that it was upon those who
 were charged, to prove circumstances which would relieve them
 from liability. The Court of Session, having found that the mere
 minutes of presence are sufficient *prima facie* evidence of the per-
 sonal liability of any body, when the act that is authorized to be
 done has engaged those who did it personally. They made an in-
 terlocutor, which the Lord Ordinary has construed, and construed
 rightly, I think, according to the sense the Court of Session meant
 to express in the interlocutor, and he shifts the burden of proof al-
 together, and considers every person is liable till he proves that he
 is not liable. Now, I apprehend that that certainly is not the cor-
 rect idea of our law: for I take our law to be unquestionably this,
 that when a trustee is dealing, upon an occasion in which he has
 engaged, that he is to be understood to be dealing in the character
 of a trustee, and to be engaged as a trustee; that unless there is
 something in the terms of the contract that he makes with others,
 which pledges his personal liability, he will be understood as engag-
 ing only as a trustee.

“ This case is certainly an extremely important one, not only with respect to Scotland, but with respect to every part of the island, because it is a circumstance, I think, which, if the law is to be carried to this extent, and to be dealt out in this fashion, will make it exceedingly difficult to find persons who will act in the character of trustees ; and they cannot act as trustees for canals, roads, turnpikes, and so on, without attending every meeting, relative to the transactions that belong to the trust which they have to administer, from beginning to end. If they ever enter the room upon any meeting, without sifting all the minutes that are entered down, and without taking the trouble of protesting, and expressly protesting against what the majority do in every instance, and *that* whether it be an instance of conduct on the part of the majority, in which the majority can bind the individuals or not, it seems to me to attach a most frightful responsibility to the character of trustees, and which ought at least to be guarded with this check, that those who charge trustees as personally liable, shall make out clearly that they have rendered themselves personally liable, by the terms and nature of their engagements.

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“ Now this interlocutor goes to this extent, that it treats the cases with reference to the period before which the fund was exhausted, and the period after which the funds were exhausted, alike ; and it places the transactions with relation to that fund, which had been raised under the authority of the act of Parliament, exactly upon the same footing as those transactions which took place after that fund had been exhausted, though it could not reasonably be expected that the transactions afterwards could be made good, out of the funds which were so exhausted, the act of Parliament having provided no more. It also leaves this, in another point of view, an extremely difficult case to be dealt with. It is not a case, as I apprehend, in which the several pursuers have, each and every one of them, a demand against each and every other of the defenders, as arising out of each and every transaction in which they state the demand ; but it is a case in which different demands may be applicable (whether they can be sustained or not I do not know) to some of the pursuers, as arising out of some of the transactions in which they engage, and in which the other pursuers did not engage. Those again who do not participate in a right to make a demand in a transaction in which they are no parties, state a great variety of demands, as arising out of other transactions to which they are the sole parties, and to which others of the pursuers are not parties in it at all. So with respect to the defenders, it is contended that they are liable,—not each of them liable to all the pursuers in reference to any particular transaction which is stated, but some liable in reference to one transaction to some of the pursuers,—others liable in reference to other transactions to the other of the pursuers,—some liable to some defenders,—others liable to other defenders,—so that there is here an

1802. action and a question arising out of every sederunt almost
 is in proof to have been had and made ; and not only that, but
 CUNYNGHAME, is a cause of action between different parties in each and ev
 &c. these sederunts ; and one general principle is applied by these
 D. locutors with respect to all of them.
 HIGGINS.

“ There certainly have been cases, in which persons, acting i
 execution of the powers of navigation acts, and acts of this n
 have been held personally liable to those whom they have emp
 A noble Lord may recollect the case of *Forster v. Dell*, in r
 to navigation. *There* the question was, whether some tru
 who thought proper to enter into a personal engagement with
 son whom they employed to do the work, were liable, becaus
 entered into that personal engagement to pay those who di
 work ; and there can be no doubt *there* of the responsibility
 who were at that meeting, for every trustee *there* signed the
 for it ; and when you saw the terms of the order and the en
 ment were once proved to be conformable to the terms of the
 there could be no doubt upon earth that the engagement w
 engagement of every person who had signed the order so author
 but it is quite a different question, Whether an individual, wh
 been present during the time *that* transaction was authorized
 had not been a party, by signing the order, could possibly have
 bound or not ? In the present case, I apprehend your Lord
 must look upon this as a case, in one respect, between person
 were employed *by the trustees* ; because I observe that those tr
 who insist that they have a right to call upon them for a con
 tion, have got an assignment of the demands of those person
 would have had a demand upon them, so that they stand i
 place of the persons who have done the work, as well as that
 actual trustees who ordered that work to be done. That, how
 carries the question no further than this, that if it were now a
 tion between the persons who did the work and the trustees
 whom proportional relief is now sought, Could the persons wh
 the work prove that the trustees who were not parties to th
 gagement with them, were nevertheless liable, by virtue of wha
 had done, as being liable to those who were parties to the en
 ment with them ? and, Could they have proved that the en
 ments which were entered into, were engagements which b
 those personally who were parties to them, and, by virtue o
 authority given to them, bound those who gave the authority, th
 they did not enter into the engagement ?

“ Now, it may be one thing, whether this order was given
 there were funds to supply it. It may be one thing, whethe
 trustees bind themselves in the particular instrument as trustee
 may be one thing, whether the trustees bind not only themselv
 trustees, but affect to bind others, but still affecting to bind
 only as trustees ; and it will be a different question again, as ap

to those transactions which the trustees, who did not enter into the contracts and engagements, have bound themselves, really and individually, have bound their representatives, as standing in their places, and have affected to bind the other trustees also individually, and the representatives of the persons who should be the representatives of those trustees.

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"There is another species of case which arises here, which is a distinguishing case from the rest, which requires a great deal of attention, when you are proceeding to determine in what case any person shall be considered as individually responsible. There are cases here, in which those who enter into them, expressly bind themselves as trustees, and go on to say, and we expressly bind ourselves as individuals, our heirs, executors, successors, and representatives. Why, if a person who has entered into such an engagement, produces another engagement, in which he has bound himself only as trustee, and has bound his heirs, executors, successors, and representatives, and has said nothing more about the other trustees, their executors, successors, and representatives, surely the very language of his contract will show that he did not bind them but as trustees, and did not mean to clothe them with a personal responsibility, which he has not, in express terms, attached upon himself by the execution of that instrument.

"My Lords, it seems to me not improper to submit to your Lordships also, that if the minutes of meeting are not in all cases to be taken as evidence, so as to throw the burden of proof upon the other side, so it cannot be generally distinguished, according to the interlocutor of the Lord Ordinary, that the burden of proof is in all cases upon the other side. A person's presence at a meeting, I admit to be evidence of his concurrence; but it is the slightest of all possible evidence of his concurrence. It is merely a fact, in which you may or may not, collect something towards the determination, whether he did or did not concur. But mere presence, as I apprehend, would not be enough to constitute his liability; and, in cases where the majority bind the others as a majority, they have no right to bind them as individuals, but only as trustees.

"As to the cases of magistrates, can any man living suppose, that a man who must be a magistrate in office for a year, and who is to cease to be in office at the end of that year, that if, two days before his official character of trustee had determined, he came into this room, perhaps for no other purpose but to see some of his neighbours collected theretogether, that he meant by that act, and that act only, to accede to any such engagement as that which might be come to, which might have bound him *personally* to the amount of ten times the fortune which he had to furnish towards making good this engagement. The very nature of the character under which a man acts as a trustee, makes the circumstance of his presence, as it appears to me, of more or less of evidence against him according to circumstances. If a man were a mere trustee, having no money to which he could resort

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except the funds (of the trust) to make good his engagement, it is less probable that he should engage, than a man of responsibility and fortune, though this presence is a circumstance of evidence of the slightest nature. A man might come into the room without any serious intention of taking any part in the business which is going on. It is too much to oblige him to prove the particulars of his conduct at that meeting to be such as to enable him to repel the conclusion, which, according to this interlocutor, is to be deduced from the mere fact of his presence.

“My Lords, the great variety of circumstances which obtain in this case, and which took place under the numerous sederunts and meetings that have been here had, will certainly raise a very strong inclination in the minds of some of your Lordships’ body, (who you are pleased occasionally to describe as noble and learned Lords, to go a great deal farther. It seems at least proper, before the appellants are charged to the extent in which they shall be liable, that it would be reasonable that some farther inquiry should be made which would bring before your Lordships the particular circumstance of each of the transactions, as applying to each of the individuals who are supposed to be affected by this *personal* liability. The proposition, therefore, which I am disposed to make, I believe with the concurrence of a noble and learned lord, and I believe may also say, with the concurrence of another noble and learned Lord, is this,—To reverse the last interlocutor, but not to reverse the interlocutor of the Court of Session; but to send it back again to that Court, to review that interlocutor generally, and also the interlocutor which confirms it;—to review the interlocutors of the 12th December 1799, and of the 18th February 1800, to remit the cause to the Court of Session to require them to review these two interlocutors generally, and that they may find from which of the defenders, and in respect of what particular sums as to each of them, the pursuers, and which of the pursuers, are entitled to a proportionable relief, and by reason of what acts each such defender became liable, and in what sums the defenders respectively are liable to contribute to such relief. There is a minuteness perhaps in the terms of the reference; but I really do not know how to apply it to a case which embraces such a great variety of transactions, in which so many individuals are and are not parties, and which transactions embrace so many differences with respect to the nature of the authorities for raising money, and the terms and the nature of the engagements under which money has been raised, and work been done, without directing the inquiry in terms thus minute.

“When the Lords of the Court of Session shall have found these particulars, what are the demands which they conceive can be made, and upon what grounds liability falls upon each individual, as to the share which he may have taken in the several sums which may have been raised, either in the execution of the trusts of these acts, or those which may have been raised, either independently of any authority

it, that may very probably lead to an entire change of these
 tors. These inquiries appear to me to be necessary in the
 circumstances of the case."

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ROSSLYN,—

ceive, that the inquiries now suggested, when completed, may
 total change of the interlocutors of the Court of Session.
 e execution of this turnpike act, the trustees do not seem
 ttended to the powers given by parliament. In all cases,
 strictly limited in their powers of charging. If they ex-
 he funds committed to them, they should have come to
 it for further powers.

road was made upon speculation as to the security of the
 they produced money sufficient, not only to pay the inte-
 debt contracted, but to establish a sinking fund, it was all
 ; but if they were only equal to pay the interest, it would
 necessary to apply for a new act.

the Court say, that, in such an event, the trustees who
 ler the first act would still be personally liable? Money
 upon the credit of tolls is often difficult to be procured.
 it in this country an indifferent security, as there is no
 given to the creditor. Money is therefore generally bor-
 d advanced by the friends of the road, and then the trust
 given in security. Public men can do no more. They
 e sure, bind themselves as individuals, but courts of law
 presume that they do so loosely.

ist, if this case should come back here, that the Court will
 mined their principle laid down, and inquire whether A,
 C, are bound to contribute, and how they are not only
 trustees, but also as individuals?"

ordship did not speak long, but what he said was spoken in
 tone of voice that little could be heard of it.]

ALVANLEY,—

perfectly agree with the two noble Lords who have
 hat I think it unnecessary to add more to what has fallen
 noble Lord who has just sat down, than to recommend
 rties, whether, instead of proceeding in this cause, they
 do that which is the only way in which they can possibly
 ef, or relieve themselves of the difficulty, namely, by apply-
 rliament to authenticate these acts, and to enable them to
 trust funds so as to go on with this work, and indemnify
 es who have already contracted, and brought themselves
 ese obligations, some of which they have discharged out of
 a private fortunes.

Lord Chancellor says he sees there is a fund open. My
 s pointed out, that these bonds, as they now stand, would
 oint of law, affect the trust funds; but thus far it will go,
 y man who has actually assented as trustee to the making
 roads, will be bound, when he comes to act again as a trus-
 funds created by act of parliament, to indemnify those who

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have laid out money from their own private fortunes on the roads, by binding the trust funds in relief and security. These trustees, now come against particular trustees, present at particular meetings, insisting that they, by their personal presence at these individual meetings, had bound themselves personally, together with the persons entering into the contracts, to the performance of those contracts, and to the payment of those sums borrowed. It is clear, when they entered into these contracts, that this was their idea ; they proceeded upon this mistaken idea, that all the trustees of the road were, either as trustees, or as individuals, equally bound. Their expression is, ' We bind ourselves, and the whole trustees of the road.' So that when they entered into those contracts, they either conceived that they were only binding the funds, or if they conceived they were binding individuals, they thought they were binding all the trustees who happened to be present at particular times ; and it was only afterwards, when they found the irregular manner in which they acted, they were under the necessity of calling upon the committee, which told them in the face, that it was impossible all the trustees of the road could be bound, that they thought fit to limit their demands upon those whom they never before conceived to be more bound than all the other trustees. With respect to the case which has been mainly relied on, I cannot say that I perfectly agree with the decision given in that case ; and it was, besides, a case very different from the present. The parties there had entered into contract, which they signed, and agreed that the contract should be performed, and there was actual consent. I believe they did not intend to bind themselves, but the contractors could never have been supposed to have entered into anything but a personal contract with them. In that particular case, the contract did not bear upon the face of it, what all our turnpike contracts do, (for our trustees are prudent enough to make contracts which nobody can mistake, and which affect pointedly the funds, and the funds only) ; that the funds only were bound. The contracts here did expressly affect the funds, but were drawn up in such a way as that no man thought himself under a personal obligation. I heartily wish, that if the produce to be expected from them is of such magnitude, as it seems hinted to be, by the learned President of the Court of Session, that the parties would relieve themselves of this burdensome suit, by going to parliament, for I fear this will produce a great deal of ill blood among the parties, who will think themselves hard used, not having intended to make themselves more bound than the others were ; and I believe, in the end, *that* will be found to be the best, the only way, in which the cause can be settled."

The Lord Chancellor put the question, which was carried *nem. con.*

Ordered and adjudged that the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of, of the 12th Dec. 1799 and

18th Feb. 1800 generally; and to find from which of the defenders, and in respect of what particular sums, as to each of them, the pursuers, and which of them, are entitled to a proportional relief, and by reason of what acts each such defender became personally liable and in what sums the defenders are respectively personally liable to contribute to such relief; and it is further ordered and adjudged, that the interlocutor of the Lord Ordinary, of the 14th May 1800 be, and the same is hereby reversed.

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For Appellants, *Wm. Adam, Wm. Alexander, Matthew Ross, Jas. Abercromby.*

For Respondents, *T. Erskine, Henry Erskine, John Clerk.*

NOTE.—Unreported in the Court of Session. Under the remit, *vide* Dow, vol. iv. p. 341, for what appears to have been done. The Road Act is the 32 Geo. III. c. 120, extended by 35 Geo. III. c. 150, (Bathgate and Airdrie Line.) The English case referred to by the Lord Chancellor was *Horsely v. Bell*, Ambler's Reports, p. 770, not "*Forster v. Dell*," as mistaken by the short-hand writer.

THOMAS GRAHAM of Calcutta, . . . Appellant;
ISABEL and ANN HENDERSON, Sisters and Exe-
cutrices of the late COLONEL JOHN HENDER- } Respondents.
SON of the East India Company's Service, }

House of Lords, 20th December 1802.

COPARTNERSHIP—LIABILITY—POWER OF ATTORNEY—RIGHT OF DELEGATION—JURISDICTION—FOREIGN.—A copartnership was empowered, as attorneys, to invest their constituent's funds in certain securities, and remit the interest. They did so, but, several years afterwards, the company underwent a change, by some of the old partners retiring, which changes were intimated to the constituent. The appellant was one of those who retired from the old company. The new company continued to correspond with and act for the party; but there was no renewal of the power or approval of their actings. They became bankrupt, with his securities and funds in their hands. In an action against the appellant to make good the loss; held, in the special circumstances, that he was liable, and that the Court had jurisdiction in the question.

Lieutenant Colonel Henderson, on retiring from India, committed the charge and management of his affairs in that country, to the house of Graham, Crommelin, and Moubray, of which the appellant was a partner; and, for that purpose, left with them, of this date, a power of attorney; and also, Jan. 23. 1787.

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of even date, a letter of instructions in regard to the business committed to them, which generally was to receive debts and funds belonging to the Colonel in India, to invest the money, when received, in securities of a certain species and to make him remittances from the interest of all stock and funds.

In 1787 Mr. Crommelin gave up his share in this concern in favour of Robert Graham, which change in the firm was specially notified by them : and that the new firm was to be conducted under the firm of *Grahams and Moubray*. The new company continued to manage and transact Colonel Henderson's business. They made up his accounts at the end of the year, transmitted them to him, and also transmitted the £500 of aggregate interest contained in his original letter of instructions. Afterwards William Skirrow was assumed as a partner, which was also intimated to Colonel Henderson ; and that the firm would continue under the name of *Grahams, Moubray, and Company*, to carry on the business.

Thereafter another change took place in the copartnership, by the appellant Thomas Graham being obliged, from his duty as a revenue comptroller, to leave the concern. On this occasion due notice was inserted to all and sundry, in the *Calcutta Gazette* ; and they also, of same date, wrote a letter to Colonel Henderson, with a copy of this advertisement, as well as a circular, to all those who did business with the company. The firm was thereafter carried on by *Graham, Moubray and Co.*

Colonel Henderson, it was proved, received the letter intimating the changes of the concern. On the last occasion, he wrote *Graham, Moubray and Co.* respecting the purchase of a pipe of Madeira, and in March 1791 he wrote him with the usual remittance of £500 ; and with this account, a list of his India Company's securities, in which the whole of the Colonel's funds were invested, except the balance of 413 rupees, was sent and annexed to this letter.

The Colonel did not order any thing in regard to the management of his affairs, further than he had done by his original power of attorney and letter of instructions. He did not homologate or concur in the handing over the management of his affairs, or his property and funds, to the new company, although he corresponded with them in regard to them.

Messrs. *Graham, Moubray and Co.* became insolvent, with Colonel Henderson's funds in their hands, and the individual

partners retired from Calcutta to the Danish settlement in Serampore, to avoid diligence.

During Colonel Henderson's life, he contemplated making Graham, the appellant, and Crommelin (who had been of the original and intermediate copartnerships, but who had retired in manner above represented) liable for the debt, as if they had been partners of the last mentioned company; but he afterwards desisted from so doing. The claim was, after his death, insisted in by his executors, the respondents, who brought the present action before the Court of Session against Graham, who then resided in Calcutta, but who had an heritable estate in Scotland—the summons being executed against him as furth of Scotland, and also against George Graham, his attorney in Scotland, concluding for payment of £4005, being the value of 35,486 rupees, or delivery of the securities above specified.

Defences were lodged by the appellant's attorney, stating preliminary defences: 1. That *ex facie* the summons itself, the action ought to have been brought in India. 2. That all parties having interest were not called.

The Lord Ordinary repelled the preliminary defences, and June 10, 1797. ordained the defender to lodge peremptory defences. On Nov. 2, 1797. representation he adhered. And, on further representation, it was again adhered to. June 23, 1798.

Defences on the merits were then given in, setting forth, that the appellant was no partner of the company by whom the debt was due. That the original partnership was dissolved by his retirement from the concern—That this was specially notified to Colonel Henderson, and to the other dealers in business with the concern, by circular; and to the public generally, by the advertisement in the Calcutta Gazette; and, finally, that Colonel Henderson had allowed the new company, after this notification, to transact and manage his affairs for him; had corresponded with the new firms—had received accounts and remittances from them, and had not only ratified the transference of his funds to the new company, but had adopted them as his doers and negotiators, by which he tacitly released the appellant from his engagements. It was answered, that the appellant had no right or authority to transfer or entrust to another party, or to the new firm, the effects committed to his care. The notification, therefore, of his retiring from the concern could not alter this liability. That letter, accompanied with the Mar. 10, 1791. account current, might import that the new company were willing to answer all liabilities of the old concern; but it

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did not import an entire devolution of the powers and trust of the old company, far less a transfer of the effects themselves. Nor could the receipt of the £500, and the pipe of wine, be considered as a renunciation of, or passing from the security of Grahams, Moubray, and Co.

Nov. 12, 1799.

The Lord Ordinary pronounced this interlocutor:—
 “ Finds it admitted upon the part of the defenders, that the
 “ business entrusted to the house of Grahams, Moubray, and
 “ Co., in the present instance, was that of holding Colonel Hen-
 “ derson’s money and securities, and making remittances for
 “ his behoof, agreeably to instructions; and that when the
 “ defender, Mr. Thomas Graham, left the company, he took
 “ care that the funds and securities should be transferred to
 “ the new company for the Colonel’s behoof; and finds
 “ that it behoves Mr. Thomas Graham either to account to
 “ the customers of the house, for what funds belonging to
 “ them the company stood possessed of, or to transfer those
 “ funds to others, duly authorized to act for the customer’s
 “ behoof; and it is alleged that this was accordingly done
 “ by the transference that was made to Grahams, Moubray,
 “ and Co.: Finds that no sufficient notification of such trans-
 “ ference was made to Colonel Henderson, by letter from
 “ the new company, dated the first day of November 1790,
 “ signifying that Mr. Thomas Graham’s interest in the house
 “ ceased that day, and that it is not alleged that any direct
 “ and positive notification of such transference was given to
 “ Colonel Henderson, either previous or subsequent to that
 “ letter, and there is not any document produced, instruct-
 “ ing the fact of such a transference having been made, or
 “ any arrangement of affairs between the former company
 “ and the new company, whereby the former company
 “ devolved upon the new the trust and agency Colonel Hen-
 “ derson had committed to them: Finds that such trans-
 “ ference and devolution is very imperfectly indicated by
 “ the account rendered to Colonel Henderson by the new
 “ company, bearing date 10th March 1791; for that account
 “ does not state the receipt of the Colonel’s funds from the
 “ former company, at the period of its dissolution, or at any
 “ other period, but continues to account to Colonel Hen-
 “ derson as if it were the old company, taking credit for
 “ payments made for his behoof during the admitted sub-
 “ sistence of the old company. Finds, that by the Power of
 “ attorney from Colonel Henderson, the old company were
 “ enabled to substitute attorneys; but no Power of devol-
 “ tion, or delegation, was thereby conferred: Finds that

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" there is no evidence in process that the account of the
 " 10th March 1791 reached Colonel Henderson, previous to
 " the bankruptcy of the new company, which seems to have
 " happened about October 1791: Finds that there is no
 " evidence that the letter, of which there is a copy inserted
 " in Colonel Henderson's letter book, and those dated 10th
 " March 1791, with a notandum, indicating that it had been
 " despatched by *Dutton and Kent*, ever reached the new
 " company, or *a fortiori*, that it reached it before its failure,
 " or was ever relied and acted on by that company, or by
 " the defender. And finds, that though this letter should
 " have reached the new company in August or September
 " 1791, it would, neither in form nor in substance, have in-
 " ferred an approbation of an entire devolution of powers
 " and trust to the new company by the old, especially when
 " no such absolute devolution had as yet been notified to
 " Colonel Henderson: Finds that the letters of the 12th
 " April 1792 from Colonel Henderson to the new house, and
 " to Mr. Robert Graham and to Mr. Moubray, were written
 " many months after the bankruptcy of the new house, of
 " which event it does not appear that any measures were
 " taken by the house itself, or by the defender, to have
 " given him intimation, whilst such measures, if duly taken,
 " might naturally have prevented the writing or despatch
 " of those letters: Finds that it does not appear whether
 " these letters were not accompanied with one also for the
 " defender, which, if produced, might throw material light
 " on the point, how far the Colonel did not still place re-
 " liance on Mr. Thomas Graham in the management of his
 " affairs: Finds it is to be presumed, from the defender's let-
 " ter of 16th February 1793 to Colonel Henderson, that
 " such a letter had actually been received by him, though
 " not now produced: Finds it also to be presumed from
 " said letter of 16th February 1793, where the defender
 " mentions having recently seen Mr. Robert Graham at
 " Chiusura,* and urged him to make out a statement of his
 " affairs, that the defender had access to show at what pe-
 " riod Colonel Henderson's securities (called dependencies
 " in the accounts rendered) were converted into cash, and
 " employed by either the former company or the new com-
 " pany, for their own purposes: Finds that though it is
 " admitted that both Mr. Robert Graham and Mr. Moubray
 " are dead, the defender has given no explanation of his
 " arrangements with the new company at the period when,

 * In the respondent's case "Chimma."

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 “ tion been given to the Lord Ordinary how the
 GRAHAM “ the new company have been winded up, nor wh
 v. “ care of Colonel Henderson’s interest on that occ
 HENDERSONS. “ taken by the defender, who states himself as ha
 “ the principal creditor of the new company : Fi
 “ under all these circumstances, no effectual *delega*
 “ has been established, whereby the former comp
 “ are said to have ceased to exist on the 31st of O
 “ 1st November 1790, are oxonerod of their obli
 “ account to Colonel Henderson and his represe
 “ Finds that the dofender, as a surviving and solv
 “ ner of that company, is liable to account accordir
 “ ordains the defenders to lodge their accounts
 “ purpose in process, and that in ten days. Re
 “ representation for the defenders, adheres to th
 “ cutor repelling the preliminary defences, and
 Jan. 16, 1801. “ with further representation.” On two reclaimi
 Feb. 5, — tions against this interlocutor, the Court adhered.

Against these interlocutors the present app
 brought to the House of Lords, including the pr
 objections to the action.

Pleaded for the Appellant.—1. The Court of Se
 incompetent to the decision of this question, bec
 subject matter having regard to transactions with
 ny and individuals in India, it ought to have been
 before the courts of Bengal. Not only has the
 been domiciled in Calcutta for thirty years, but th
 transactions alluded to took place in that count
 power of attorney was executed there, and there a
 the securities and funds of Colonel Henderson,
 with the copartnerships which successively existe
 hardship, therefore, to which the appellant is exp
 the present suit being brought to this country, is a
 and ought therefore to be dismissed. But, 2d. Colo
 derson having had complete notice sent him of th
 lant’s withdrawal from the firm of Grahams, Moubra
 upon the 31st October 1790, and that a new copar
 was to be established, under a different firm, wh
 succeed to the business of the agency, and, among
 to be entrusted with his affairs, he must be held to
 proved of this transference of his affairs to them, and
 adopted the new firm, by allowing his securities to
 in their hands, corresponding with them, and recei
 mittances from them as his doers or agents, which are

stances so strong as to amount to a discharge and release of the appellant from all responsibility. If Colonel Henderson understood otherwise, then it was his duty to say so by return of post. If he did not adopt the new firm as his agents, and approve of the transference of his affairs and means to their management, he ought to have written to this effect, or employed other agents, in either of which case, the appellant would have been put on his guard, and, to save all responsibility, the funds of the Colonel would then have been placed beyond all risk ; but not having done so, his silence must be held as a tacit approbation of the transference of the arrangement of his affairs with the new company.

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Pleaded for the Respondents.—1st. The appellant has again, after stating his peremptory defences, revived his objections to the summons, and to the jurisdiction of the Court in this question : but in neither can he be serious, because in themselves they are extremely ill founded. Every Scotsman, though abroad, is subject to the Courts of this country *ratione originis*. But if he has an heritable estate in this country, which is the fact in the present case, the question then admits of no doubt whatever. It is further placed beyond all doubt, by his having an attorney in this country, who actually appears and states defences, although these defences be to object to the jurisdiction. It is of no consequence that the other partners have not been called ; because, as the company no longer subsists and carries on business, and is now dissolved and bankrupt, the same necessity of calling the whole partners to an action raised for a partnerny debt does not hold. The pursuers are entitled to have their remedy against any one partner, where that remedy can best be found. They could not cite the other partners, residing in a Danish settlement, to appear before this Court ; and so the objections on both grounds are untenable. 2d. But, upon the merits of the case, it is clear that an agent, or a party acting under a power of attorney, cannot shake himself free of the responsibilities it imposes, without he can show an express liberation from his constituent. It is equally clear that the company, to whom the power of attorney was originally taken, could not delegate their office to another, or transfer Colonel Henderson's affairs and funds to another, without express authority from him. It was a trust of the most onerous kind, entailing responsibilities such as could not be so lightly dealt with. Colonel Henderson may have relied upon the joint exertions, prudence, fitness, and responsibility of the whole, in

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imposing this trust; and, in employing a company for the management of such affairs, this is generally to be presumed. It was therefore beyond the power of the old company to hand over the management to the new company, without express authority and consent. Nor do the letters of notification of the change in the firm, alter or affect this conclusion. The Colonel, by his silence, and by his correspondence with the new company, never for a single instant gave them to understand that he had liberated the old firm, or any individual member of it; and, therefore, there is no ground whatever on which to rear the superstructure of an implied discharge.

After hearing counsel,

LORD CHANCELLOR ELDON said,

“ My Lords,

“ The present appeal brought into discussion before your Lordships a great variety of matter. I therefore deemed it not unfit that you should pause a while before coming to a decision upon it.

“ It is not according to the usage of this House that the grounds of your judgment should be stated, when the affirmance of a decree under appeal is moved for. I have often, in my own particular case, lamented that such was the usage, but it has been sanctioned by universal practice, and the wisdom of this House, for a long period of time.

“ I shall therefore only say a few words on the second question made in this case, that which respects the merits of the matter at issue. After looking through the whole case again and again, I do not see grounds for a reversal of the interlocutors appealed from. I think it proper to state, that the judgment seems to me to stand altogether upon the circumstances of the present case, and that, so far from affording any general rule in other cases and other partnerships, it may not, perhaps, form a rule in other cases arising out of other circumstances relating to the same partnerships.

“ The specialities and particular circumstances of this case are the grounds upon which, in my opinion, the interlocutors should be affirmed.”

It was therefore,

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *Wm. Adam, Samuel Romilly, Matt. Ross,*
Tho. W. Baird.

For Respondents, *S. Percival, Wm. Alexander.*

NOTE.—Unreported in the Court of Session.

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LORD KINNAIRD, *Appellant* ;
JAMES MATHEWSON, *Respondent*.

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House of Lords, 27th Dec. 1802.

LANDLORD AND TENANT—DEDUCTIONS FROM RENT.—Circumstances in which the tenant was held entitled to deductions from his rent, on account of part of the lands being taken away to make public drains and roads ; also to deduction for the insufficiency of houses and steadings blown down by the wind. Reversed in the House of Lords, and held the tenant not entitled to these deductions.

An agreement for a lease was entered into by the respondent's father with the appellant, whereby he offered his Lordship, " for every Scotch acre of the West Mains of " Inchture 30s. Sterling, two firlots of wheat, and two firlots " of barley." The measurement of the number of acres was not mentioned in the lease ; but it was stipulated that " all public drains shall be excluded from the measurement, " which shall be ascertained by William Ireland ; and, when " so ascertained, the rent to be extended *in cumulo* in the " principal tack." The lands contained two farms, the lease for the one was to be for 21 years' duration, the other for 19 years.

This offer was accepted of in writing, and the agreement for the lease was thus concluded. Mathewson, the tenant, entered into possession. The lands were measured off as containing 87 acres, 3 roods, and 33 falls, under deduction of those lands not entered into at 1794, in consequence of being in the possession of another. £500 was allowed the tenant for building new steadings. The landlord built these, and the tenant approved of their sufficiency ; and, on a report on the buildings, it showed that they were conform to the agreement. These, some years thereafter, were blown down by the wind. No formal lease was entered into : the stipulated rent was paid, as was alleged, without objections of any kind, during the tenant's life.

After the tenant's death, the respondent, his son, succeeded to the lease, and continued the management of the farm, as he had done some time previous to his father's death, until he fell into arrear with his rent, when an action was raised against him for arrears of rent before the Sheriff, concluding for payment of the sum of £539. 9s. 5d., under deduction of £200, being the value of some property which

1802. the appellant purchased some years ago from his tenant, John Mathowson. In answer, the respondent insisted on several claims of damages, in consequence of not timeously obtaining the repairs, and the new steading stipulated in the lease, also damage for its insufficiency, and also for parts of the lands which had since been taken up for drains, and by the road trustees for a turnpike road. In order to support these, he brought a counter action, in which he claimed, 1. Deduction for rents of those parts of the farm occupied by roads, drains, &c. all of which were nevertheless included in Mr. Ireland's measurement. 2. That he should have allowance on account of the insufficiency of the farm houses or steading. 3. That having taken the two farms, as occupied by James Crow and James Just, he was entitled to the two family seats in the church occupied by these tenants. The two actions were conjoined.

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Mar. 20, 1799. The Sheriff pronounced this interlocutor: " Disallows of, " and repels the pursuer's (respondent's) claim of damages " for not having sooner than in July 1797, obtained possession of the new steading of houses referred to in the first " article of his complaint. Repels his objection to these " houses, both in point of accommodation, and in point of " value; in regard it clearly appears that the steading in " both these respects, had the approbation of the tenant to " whom the possession was let, and were accepted of and entered to, and have been possessed accordingly: Finds that " the pursuer is entitled to a seat or seats in the parish " church, sufficient to accommodate the family and servants " residing on the farm, but that he is not entitled to more. " Appoints him to say if the three seats allotted to him are " sufficiently roomy for his family and servants: Repels the " sixth, seventh, eighth, and ninth articles, respecting the " ground taken off the pursuer's farm by the trustees on the " turnpike roads from Perth to Dundee; reserving to the " pursuer to make any claim competent on that account " effectual against the trustees, as the law directs." On advocacy, the bill was refused by Lords Glenlee and Meadowbank successively. But, on reclaiming petition to the Court, their Lordships remitted to Lord Meadowbank to remit to " the Sheriff, with these instructions, to proceed in " directing the remeasurement of the farm, in order to " ascertain the extent of land in the tenant's actual possession, exclusive of those parts of the farm which are occupied by roads, fences, embankments, or public drains, or

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By the steading of houses and barn yard, and to find him only chargeable by his landlord for the remaining lands after the above deduction."

On reclaiming petition from both parties, the Court referred to Lord Meadowbank to remit to the Sheriff "to inquire into the fact as to the insufficiency and falling of the houses, and to find the petitioner, James Mathewson, entitled to corresponding deduction of rent during his lease, for the ground rendered unarable by the soil being carried off to make the roads; also to find the petitioner entitled to the best seat in the church belonging to the farm; and, with these additions, adhere to their former interlocutor reclaimed against, and *quoad ultra* refuse the lesire of both petitions."

The Lord Ordinary (Meadowbank), accordingly, remitted the Sheriff, as directed; and, in terms of the remit, the Sheriff found, "that the defender's claim of compensation will fall to be sustained when liquidated; prorogates the diet for the defender's signing the disposition till the 10th day of June next, and *quoad ultra* adheres to the former interlocutor, and decerns." And in the action at Mathewson's instance against the appellant, the Sheriff-substitute, the same date, pronounced this interlocutor: "Finds the pursuer only chargeable with rent for the lands in his possession, exclusive of those parts of the farm which are occupied by roads, fences, embankments, or public drains, or by the steading of houses, or barn yard; and, in order to ascertain the extent of the land in the pursuer's actual possession, exclusive as aforesaid, appoints William Ireland, land-surveyor, to remeasure the pursuer's farm, and to report his measurement the 10th day of June next; appoints the pursuer to state particularly his allegation in the proceedings before the Court of Session regarding part of his houses having been blown down by the wind, that that circumstance may be inquired into, as directed by the Lord Ordinary's remit: Finds the pursuer entitled to a corresponding deduction of rent during his lease for the ground rendered unarable by the soil being carried off to make the roads, and appoints him to give in a condescendence thereanent; and finds the pursuer entitled to the best seat in the church belonging to the farm, and *quoad ultra* adheres to the former interlocutors, and assigns the 10th day of June for the pursuer to condescend as foresaid."

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Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The direction to measure the farm of new, “in order to ascertain the extent of land “in the tenant’s actual possession, exclusive of those parts “which are occupied by roads, fences, embankments, or “public drains, or by the steading of houses and barn yard, “and to find the tenant only chargeable with rent for the “remaining lands,” is repugnant to the solemn agreement of the parties, and, in truth, making a bargain for them which they never thought of themselves. The tenant agrees to pay a rent for every acre on the farm, to be ascertained by the measurement of Mr. Ireland, which is a common mode of letting land in the country. This offer the landlord accepted of, and Mr. Ireland ascertained and fixed the measurement accordingly. The respondent contends that he is not liable for that measurement, but only for what yield profit, or for arable acres, and therefore maintains, notwithstanding this agreement, and notwithstanding the measurement following thereon, that certain parts shall be excluded in the computation, upon an idea that rent should not be paid for land which does not yield profit, or is incapable of cultivation. If this untenable proposition were given assent to, it would unhinge and unsettle every lease on the appellant’s estate, as well as in the neighbourhood. Besides, it is manifestly based on an erroneous view of the agreement; for, when the parties entered into it, they well knew that there were parts comprehended in the farm which could not be under crop. The agreement says, that when the measurement is ascertained, *the rent shall be extended in cumulo in the principal lease.* Had a formal lease been made, the rent would therefore have been stated in gross, and not at so much per acre; and, in that shape, it seems utterly impossible to contend that the Court could have interfered to restrict or diminish the gross rent, on account of there being certain parts of the farm unarable, or unprofitable to the tenant. Yet the matter still standing upon the agreement, can make no difference upon the justice of the case. And this construction of the agreement is fortified by one exception made therein, namely, that public drains should be excluded in the measurement, which is equal to the most explicit declaration, that every thing else should be included. The farm is part of a large tract of level carse land, that is, land which has, at an early period, been recovered from the

sea or the river, by drains and embankments. Some of the drains are public or common property, and it was agreed that the land occupied by them was not to be computed; but there were private drains, fences, roads, &c., which the parties could not but have in view; and if their idea had been that the rent was only to be calculated by the number of acres fit for cultivation, a further exception of private drains would have been made. In the proceedings before the Sheriff, the respondent at first contended that Mr. Ireland's measurement must be the rule, but, with singular inconsistency, he afterwards maintained that there ought to be a new measurement, and that the site of the farm houses, barnyard, roads, &c. ought to be left out. The Sheriff, well acquainted with the custom of the country, could not listen to this; but he was more successful in the Court of Session. And this, after rent had been repeatedly paid according to Mr. Ireland's measurement, which, applied to the agreement, brought the money and corn-rent to the most minute fractional parts of a pound, and of a boll. Is it possible then to believe, or can the respondent be heard to allege, that the tenant did not know he was nominally paying rent for parts incapable of cultivation? The direction, therefore, to make a deduction generally, for all roads, ought not to be sustained. So ought the deduction given for the present state of the farm houses or steading, as not being countenanced by the agreement, as well as contrary to the transactions subsequently had and passed between the parties, whereby the tenant approved of their sufficiency.

Pleaded for the Respondent.—1st. In regard to the sufficiency of the steading, nothing has been determined either by the Court of Session or the Sheriff in regard to it. The former has merely directed the Sheriff to inquire into the fact, as to the insufficiency and falling of the houses blown down by the wind; and no good reason can be assigned, or has been assigned, why this fact should not be inquired into. These houses were agreed by the lease to be erected. They were erected by the landlord, and though built conform to agreement, their falling down by the wind supposes insufficiency of a very glaring nature. 2. Regarding the measurement of the ground. It was unquestionably agreed on that the rent was only to be payable on arable acres, or acres yielding by culture profit to the tenant. This necessarily excludes what the tenant does not, or cannot possess; and, therefore, in so far as the land has been taken up by drains and by public

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turnpike roads running through the farm, the Court has properly found him to have right to deduction on this account. The appellant has not said, and, in point of fact, cannot say, that these were included in Mr. Ireland's measurement; and therefore it is just that the tenant should not pay for acres that he does not possess. The same applies to that part of the ground rendered unarable, by the soil being carried off to make the roads. And the seats in the church is a claim beyond all dispute. The claims of compensation thus in view will therefore be best inquired into, and expiscated by the Sheriff.

After hearing counsel,

LORD CHANCELLOR ELDON said,

“ My Lords,

“ This case comes before your Lordships on the appeal of Lord Kinnaird, against several interlocutors of the Court of Session, of 15th November 1800, another of the same date, in the conjoined action between the parties, of 20th January 1801, of the Sheriff-substitute of Perthshire, 27th May 1801, and of the Lord Ordinary, 12th June 1801. It arises out of circumstances which I must detail at some length, to render myself intelligible.

“ The connection between the parties is that of landlord and tenant. Lord Kinnaird, and the father of the present respondent, had a similar connection in the respondent's present farm, and in another called the Polgavie farm. John Mathewson having entered into a treaty with Lord Kinnaird for a lease of the present farm, on the 6th August 1794, stated his proposition to the landlord by way of missive; and, in the same way, his offer was accepted of on the 7th August, on the part of the landlord.

“ The respondent states, that these missives having provided for the admeasurement of the farm, it was the expectation of his father that the lands were to be forthwith measured, and the payment of rent to be made according to such measurement. A question was made in this cause, Whether this was to be considered as a lease executory, or a lease executed? On considering the nature of the instruments, I can entertain no doubt as to this question. Every syllable in them shows that it was a lease executory. At same time, I confess, it does not appear material to discuss this question.

“ It was never doubted, in the course of the argument, 1st. That parties were bound to permit a measurement to be made by Ireland; and, 2d. that Ireland was bound to make such measurement according to the legal meaning of the instruments, else parties could not be bound by it. It is true, that if parties, duly informed that the measurement was not justly made in terms of the agreement, still chose to act upon such measurement, they might be bound by the

acquiescence. But I am clearly of opinion, that if parties acted on Ireland's measurement, with a persuasion that it was justly made, and if they were mistaken in this, when the lease came to be matured they had a right to relief.

"It appears, though I cannot distinctly state when, that Ireland did actually measure the farm, and it is admitted that he included in it matters which the tenant (respondent) alleges should have been excluded; and that the tenant paid his rent according to such measurement. But I cannot see in the papers in the cause any distinct evidence of what the tenant averred, as to whether he did or did not know that this measurement included several particulars which ought not to have been in it. He must have known that some of these were included in it, if he *thought* at all upon the subject.

"The missives say that a sufficient *steading* was to be built upon the farm. I do not enter at present into the question on whom the obligation to build, or to defray the expense lay, or how the sufficiency of these buildings was to be ascertained;—a *steading* was built, and the landlord says that this obligation was fulfilled;—the tenant says it was not fulfilled; and this formed the first of his claims against the appellant. 2. He insisted to have reparation for the alleged errors in Ireland's measurement, and for certain portions of the farm of Polgavie which had been taken for public roads, &c. 3. He claimed all the seats in the parish church which had been possessed by those parties mentioned in the missive as the former occupiers of the farm. And, lastly, he claimed £200, with interest, from Lord Kinnaid, for a piece of ground purchased from the respondent's father.

"The respondent meantime having refused to pay his rent, the appellant made a demand for it before the Sheriff-substitute of Perthshire. This demand was resisted by the respondent on the grounds before mentioned. The respondent also brought his counter action for those claims; and the controversy appears to have proceeded with keenness on both sides; how this was provoked, is not worth your Lordships' discussion or inquiry.

"At length the Sheriff-substitute, on the 20th March 1799, pronounced this interlocutor. (Interlocutor read.)

"As to the first article of the pursuer's libel, the *steading*, the principle of the interlocutor is, that the tenant having entered to and possessed it without objection, was to be held as considering it sufficient in terms of the missive, which the Sheriff considered to be decisive against the tenant. With regard to the 2d article of the pursuer's libel, *that* alluded to two circumstances, first, that part of the Westmains farm was not included in the tenant's possession, and the other, that a part was left out, which, by the boundaries specified in the missive, the tenant ought to have had; these portions were not large;—the Sheriff ordered production of Ireland's measurement, with a view to determine if these boundaries were

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included in it. Whether that production would have been decisive or not does not appear, but if made, it would have let the Sheriff into the question, whether the farm was to be remeasured or not. The interlocutor next proceeds to the fourth article of the libel,—the seats in the church, with regard to which the Sheriff declares, that the pursuer was entitled to seats sufficient for the accommodation of his family. The Sheriff repels the 6th, 7th, 8th, and 9th articles of the libel, but reserves a compensation in another quarter. These claims were made by the tenant against Lord Kinnaird, in consequence of parts of the farm of Polgavie being taken for public roads the tenant insisting against his landlord for a compensation by a deduction in rent; Lord Kinnaird, on the other hand, contending that this was done by trustees under an act of parliament, of whom his Lordship was one, and that the compensation therefore was only to be demanded in terms of the act of parliament, and ought not to be conjoined in an action of this sort. The meaning of the interlocutor as to the last article was, that if the pursuer proposed to have this £200, he was at same time to deliver a proper conveyance to the defender.

“To this interlocutor the Sheriff-substitute adhered, and the Sheriff-depute did the same. So far, therefore, as this judgment can be stated, it was in favour of Lord Kinnaird, after twice considering the subject. The respondent now appealed to the Court of Session, and Lord Glenlee, Ordinary, on 17th July 1800, pronounced this interlocutor. (Interlocutor read.) And a second bill having been presented, was also refused by Lord Meadowbank as Ordinary. These interlocutors were all in favour of the appellant. The respondent, availing himself of Lord Meadowbank's permission, lodged petitions with the Court against the interlocutors which had been pronounced. In the action of rent, the Court, on the 15th November, pronounced an interlocutor, directing a remit to be made to the Sheriff, to allow a farther time for signing the conveyance above referred to, and to sustain the claims of compensation when liquidated.

“The prayer, in the respondent's reclaiming petition in the action of damages, is worthy of particular notice. It is in these words: (same read). As I read the prayer of this petition, the respondent confines his claims to the same articles as before the Sheriff-substitute,—the complaint with regard to the steading, the complaint for an alleged defalcation in the quantity of land, the matter of the seats in the church, the turnpike roads, &c., and the matter of the £200, with the exception of the claim of deduction for the site of the steading and barn yard, which is now first set up. The Court, on the 15th Nov. 1800, pronounced this interlocutor. (Interlocutor read). The tenant is here to have deduction as to those parts of the present farm which ‘are occupied by roads, fences, embankments, public drains, or by the steading of houses and barn yard.’ The following particulars as to this seem worthy of notice.

"As to *roads*, nothing was to be found with regard to them in the respondent's claims on the farm of Inchtute. Not only the turnpike roads, but the occupation roads, and those of every description whatever, had relation solely to the Polgavie farm. As to *fences*, there was no claim for their being deducted, neither before the Sheriff nor the Court of Session. If the Sheriff, therefore, was to determine, in consequence of this remit, on the claims already before him, he could decide nothing as to them.

"*Embankments*.—It is whimsical enough that directions are given to deduct these in measuring the farm. These embankments, as to which the respondent claimed compensation, were on the farm of Polgavie, not of Inchtute. Of these, however, the interlocutor directs deduction to be made; and then it adds, what the tenant had not yet claimed, "exclusive of *public drains*;" and no doubt these are expressly excluded in the missives.

"The interlocutor, lastly, gives deductions of the ground occupied by the *steading of houses and barn yard*. I see that before the Sheriff, the respondent had no idea of claiming such a deduction; and, if any argument arises as to the understanding of parties at the time of entering into the missives, in interpreting their meaning, it may from this be contended, that the claim as to this was entirely an after thought.

"The interlocutor having thus given the respondent more than he asked, he naturally enough determines to submit his case to the Court, to see if he cannot get something more. Then he prays the Court will grant him this relief. (Prayer of 2d reclaiming petition of respondent read).

"After answers for the appellant, the Court, on 20th January 1801, pronounced this interlocutor. (Same read). I shall show by and by, that this ground, mentioned to have been rendered unarable, had been made so before the tenant entered to the possession. (His Lordship now read the subsequent interlocutors in the cause without comment).

"From these interlocutors an appeal has been brought to your Lordships. Speaking as I should do, in the courts of this country, I may say, that it has struck me that it is very difficult to reconcile them in point of principle with themselves. Your Lordships will see, in the last interlocutor, that the tenant gets a deduction of rent, on the ground that the soil had been carried off a portion of his farm, which was thereby rendered unarable. I see the respondent had also claimed a deduction for marshes, or land always covered with water. These must have been at least as unproductive as the other, but no deduction is given for them. As to *barn yard and steading*, which are to be excluded, what principle is there which protects the other houses mentioned in the agreement, but excludes them? If a tenant be evicted from his possession in this country, a reduction of rent is not held to be a sufficient compensa-

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tion, but he is also entitled to a recompense in damages for the loss he sustained by being deprived of the beneficial enjoyment. Perhaps the same principles may not apply in Scotland to regulate the proceedings of the Court of Session.

"The claims which I have been mentioning, arise out of an instrument which I shall now state more particularly. (Here his Lordship read the missive verbatim).

"*Prima facie*, the words, 'every Scots acre of the West Main Inchtute' includes every particle of that land. It was stated however, that *bona fides*, and moral justice required, that when certain rent is to be paid per acre, it was requisite that every unproductive or unproductive part of the farm should be excluded in numbering the acres. The question is, Where is this principle of law to be found? This is stated in the printed papers with such a difference of expression, that it is difficult to think that it is confirmed decisions.

"Those who argue on *bona fides* are bound to state distinctly what *bona fides* truly requires. In one paper, it is said that the land must be susceptible of cultivation. It is no easy matter to state what is or is not so susceptible.

"In another paper of the respondent's the words used are, *capable of production*. So that, when I come to let my lands at so much per acre, the tenant is to refuse paying his rent, till it be ascertained how much is susceptible of cultivation, or capable of production. In another paper, it is said, that the tenant shall only be bound to pay for what is *capable of cultivation and production*. Another argument of a singular nature appears in one of the papers, and the authority of a high character is urged on behalf of the respondent's argument from the circumstances of his name appearing to a paper, when counsel at the bar, in which a similar argument was maintained (Here his Lordship read from the respondent's petition.) These considerations of *bona fides* and *moral justice* have little room, when persons enter into a contract.

"Put the case of a person taking a lease of this house, covered as it is with benches, which so far prevented the tenant from applying it to a given use, and that he had agreed to pay so much per square foot for the whole. He could not surely obtain a deduction of the rent for the portion so covered with benches, but must take the bad and the good together. In the same manner, if I take a farm, though some part may be covered with houses, and other part may be marshy and unproductive, may I not exercise my judgment upon this, and give thirty shillings for every acre, some of which may be worth nothing, and some worth forty shillings?

"But this is not all; the tenant has his advantage in another point of view, from thus interpreting the lease. By the mode of cultivation here pointed out, the tenant is restricted in some years from having more than a fifth part in wheat or barley. In reckoning

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ing the fifth, the tenant has a right to include the whole farm, though part of it should be considered as unproductive. The question, therefore, is merely matter of discretion, whether a rent of 30s. per acre is to be paid or not ; it is impossible but the rent must be calculated on the average of the whole ; and I see no ground in *bona fides*, or *moral justice*, upon which to support the respondent's claims.

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"The question then is, Whether the *lease* orders the lands to be measured with a view to those reductions claimed by the respondent ? It was said, the custom of that part of the country would so interpret it ; but as positively as this is asserted on the one hand by the tenant, it is on the other denied by the landlord ; and we have nothing else for it.

"Before the Sheriff not a word was said of the steading and barn yard as being to be deducted in the measurement. Is not this evidence that the respondent, while making a great many claims, did not think fit to bring forward these ? Besides, this is the case of a lease, which says that there was not a sufficient barn and steading upon the farm ; but that such were to be built in two years from the entry. They were built too, with the tenant's acquiescence, upon James Just's possession, the entry to which was not till the separation of crop 1795 from the ground.

"In this country the *res gestæ* would have shut out all claims upon this head. Mr. Nolan, who argued this case, as he has done a great many others, with much sound judgment, was gravelled to death, when asked why the steading should, under such circumstances, afford ground for a re-admeasurement of the farm. He says, it was to fix the *cumulo* rent. But how can this be applied to what was the subject of future plans, and of future expense ? Can it be contended, that, after a measurement and rent paid for the first year, the farm was to be remeasured in the second or third year, when the steading was built ?

"Besides, the clause in the lease is capable of being interpreted two different ways. Public drains, steading, and cottars' houses, &c. are severally mentioned. It cannot be said that the law has declared, that all these are to be excepted from the measurement ; but as it has excluded the public drains, a strong argument arises from thence, that as these are expressly excluded, parties did not mean to exclude the others.

"Take it the other way ; if the law had excluded the whole, parties might still competently say, we will select what shall be excluded and what not. Where is the improbability that they who specially excluded public drains, meant to include nothing else ? The tenant says he sustained damage, in this very productive part of the country, by part of the old road through Inchtute not having been made arable for four crops :—how could this man suppose that this part of the old road was not to be included in the measurement, while he claims damages for part of it not having been made arable ?

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" With regard to the occupation roads, if parties will not exclude these distinctly in their arguments, is it not infinitely better for the security of property, that your Lordships should read them this lesson, that you will not let loose those instruments, which parties can make as they please, upon averments similar to those urged in the present case? Is it not better to put parties upon such *astutia*, that they shall distinctly state what is granted, and what to be enjoyed? I do not enter into the matter of the fences and private ditches,—the same reasoning applies equally to them.

" The next point is, that in the interlocutor of 20th Jan. 1801, directing inquiry to be made into the sufficiency and falling of the house I shall read in one short sentence the terms of the missive as to this (the same read.) This is expressed in a very slovenly manner; but it is to be noticed, that the entry to different portions of the farm was at different periods, and the steading was to be built within two years after the entry; the steading also was to be built on Just's possession, to which the tenant did not enter at the date of the missive. Surely it would make wild work, if a tenant, occupying a farm while the houses are building, without complaint, and, in such circumstances, were still allowed to maintain an action of damages for building there upon that site, and for any alleged delay thereby occasioned.

" But the respondent said, further, that the steading was insufficient. 2. That Lord Kinnaird was obliged to build it. And, that he was to lay out £500 upon it. Notwithstanding the very slovenly terms of the missive, I deny that it gives ground for these averments. If we look only at what the respondent has printed in Italics upon this subject, you might see something of what the appellant states. But how was the tenant to produce the vouchers to the landlord, if he was not to lay out the money? Lord Kinnaird was to make the steading sufficient, and expend £500 upon it. Nothing being said as to the mode of determining the sufficiency—parties might have litigated upon this for ever: but they were also competent to decide upon this themselves. This very respondent appears to have taken a part in determining this. His father and he had seen the progress in this from beginning to end. They were aware of the site; the season when the building was going on, and the size. When the expense of £500 was laid out, the tenant and the landlord called persons together to inspect them, and the tenant, by letter, accepted them as sufficient, and declared that he had no further claims on the landlord relative to these. What situation would a landlord be in, were it suffered, that after rent is due, payment is stopped, and he is to be involved in a law suit on such pretext as this? It distinctly appears to me, that the tenant's mouth was closed for ever on this subject.

" The next point is, a deduction claimed from ground rendered *unavailable*, by the soil having been carried off to repair roads. There are two grounds why, in my opinion, the interlocutors ought not to

affirmed as to this. 1. This was done before the tenant's entry ; he does not then object to this ; but after three or four years' possession, he says, a rood or two was thus rendered unarable, therefore I will not pay any rent till I have compensation. As the Court does not always, as we do in this country, in such circumstances, take out of a party's hand what he would withhold from the landlord, they ought to have been sure that the tenant was right in this, before thus allowing him, by retention of rent, to arm himself against his landlord. But, in the 2nd. place, if right in this, the Court has not done him justice in other respects ; this is much better than marshy land, and yet the Court has refused him a deduction on that account.

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“ The next point is, with regard to the *best seat* in the church. He contends, that he took the farm as possessed by certain other persons, and that therefore he was entitled to all the *appurtenances* which they enjoyed. But the farm, though described as being formerly possessed by others, is also described by certain *boundaries* ; and it is clear, that if he did not possess all that the former tenants held, he could not possess it by all their metes and bounds. If he had not the whole of their farm, then why should he claim the appurtenances of the whole, or the *best part* of these appurtenances ? Is it necessary that he should worship God in a manner pleasing to his vanity ? Is not ample justice done him, to give him seats roomy enough for his family, &c. ? The interlocutor, as it stands, only tends to entangle the landlord with those who have possession of the other seats.

“ With respect to the turnpike roads on the farm of Polgavie, the Sheriff reserved the tenant's claim against the trustees under the act of parliament, and as the Court of Session has not gone beyond that, the appellant has here no ground of complaint. It may be questioned, if this reservation be sufficiently broad for the respondent ; not that I consider that this should be held a ground for retention of his rent. If it could be made out, that Lord Kinnaird, though a trustee under the act, but not proceeding *debilo modo*, had taken the man's land from him, though the tenant would still have recourse against the trustees as such, he ought farther to have compensation personally, as against Lord Kinnaird.

“ Though I am ready to admit that the tenant's argument upon this head is just, yet I am far from saying that Lord Kinnaird's intermeddling in these roads may not have been strictly according to the act of parliament. The utmost your Lordships could do here, would be to reserve any action competent against Lord Kinnaird, as well as against the trustees.

“ With regard to the admeasurement of the farm, if the interlocutor of the Sheriff is affirmed, with an alteration only in so far as respects the exclusion of public drains, in my opinion this will be all that public justice requires. And if some words are added to the

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reservation with regard to the turnpike roads, as before alluded to, this is all that I think the tenant can justly demand.

"It may require an hour's time to put these words together in proper form for these purposes; and I shall therefore move to adjourn off this cause till to-morrow. In the meantime, I deemed it convenient thus to discharge my mind of these matters, to save delay and further expense to the parties."

Next day his Lordship read the following judgment:—

The Lords find, that, according to the agreement contained in the Letters Missive, and under all the circumstances of this case, the tenant is not entitled to any allowance or deduction out of his rent for the farm except for such parts thereof as are occupied by public drains. Find also that, in the circumstances of this case, the tenant is not entitled to have any inquiry made into the alleged insufficiency or falling of the houses; and that the tenant, in the circumstances of the case, is not entitled to a deduction of rent during his lease, for the ground alleged to be rendered unproductive by the soil being, as is alleged, carried off to make the roads. And find that the tenant is only entitled to a seat or seats in the parish church sufficient to accommodate his family and servants residing on the farm. Find that the tenant is entitled, with respect to the ground alleged to have been taken off his farm by the trustees on the turnpike roads from Perth to Dundee, to have the benefit of a reservation not only of the claims competent on that account effectual against the trustees, but also against the appellant, in any other proceeding. Find that the tenant is entitled to have the possession of the lands described by the boundary in the missive of the 6th of August 1794. And it is ordered and adjudged, That all such parts of the several interlocutors complained of as are inconsistent with these findings, be, and the same are hereby reversed. And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, and that the said Court do give all necessary and proper directions for carrying this judgment into execution.

For Appellant, *W. Adams, Adam Gillies.*

For Respondent, *Sam. Romilly, J. Reddie, M. Nolan.*

NOTE.—Unreported in the Court of Session.

RODERICK FINLAYSON, and Sixty Others,
 Tenants and Possessors of the several
 Farms belonging in property to Hugh
 Innes of Lochalsh, Esq., } *Appellants ;*
 HUGH INNES, Esq. of Lochalsh, } *Respondent.*

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House of Lords, 28th Feb. 1803.

**REMOVING—TITLE TO SUE—INFESTMENT—CLAUSE OF BARONY,
 AND CLAUSE OF DISPENSATION—SUMMONS—CITATION.**—Tenants
 held their leases for nineteen years, with a break in favour of the
 landlord at fixed periods. On sale of the estate, he gave notice to
 the tenants of his intention to avail himself of the break, and sum-
 mons and decree of removing were obtained, on an understanding
 that they were to remain for another year. Thereafter the purchaser
 raised a removing against them, to which they stated objections to his
 title to sue, his infestment in the lands disposed, not having been ta-
 ken on the ground of the lands, but on others from which they were
 disjoined; and also, that the summonses were not signed by the clerk
 of court, but merely by a procurator of court, and that the citations
 were not executed by a Sheriff officer of court; but by a messenger
 at arms, without any authority to act as Sheriff officer. These ob-
 jections repelled. Affirmed in the House of Lords.

The appellants were all tenants of Lord Seaforth, under
 leases granted in 1794, for the period of 19 years' duration.
 In the leases there was a clause entitling the landlord to be
 free of the leases at Whitsunday 1801 or Whitsunday 1808,
 upon warning being given to the tenants nine months pre-
 viously thereto. Lord Seaforth having it in contemplation to
 sell the estate, availed himself of this clause in the lease;
 and gave notice of his intention of so doing at Whitsunday
 1801, which intimation was afterwards followed up by action
 of removing, to which defences were lodged, but after-
 wards withdrawn and waived, and decree pronounced, on
 the landlord allowing the tenants to remain for another
 year; the tenants, on their part, signing a declaration giving
 up all opposition to the ejection.

The estate was, in the meantime, sold to the respondent,
 on this date, with right to the rents falling due after Mar- Jan. 31, April
 1800, in which he was infest; and having different and May, 1801.
 views with his estate, he gave all the tenants warning in
 Mar. 1802, by executing a summons of warning to remove at
 the expiry of that term; Action was raised before the Sheriff
 of Ross and Cromarty for ejecting them. Defences were

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lodged, stating, 1. That the respondent was not the letter of the lands, and therefore had no title to insist in that character; 2. That it was incompetent for the respondent to prosecute *qua* heritor, because he was not *legally* infest in the lands, as it appeared, from his sasine produced as his title, that the infestment had not been taken upon any part of the lands conveyed to him but at the manor place of Braham, situated upon other lands still the property of his Lordship. 3. That the summons was irregular in point of form. It was not subscribed on each page, but on the last only; nor subscribed by a clerk of court, but only by a procurator of court. 4. That the executions and the citations were equally irregular, these having been executed by a person not an officer of the Sheriff court, but by a messenger at arms.

The respondent replied, 1. That, in point of fact, he was the letter of the lands to the defenders, who therefore had no right to object to his title, whether good or bad. 2. That his infestment was perfectly unexceptionable, in respect that by the crown charters in favour of Lord Seaforth, infestment taken at Castle Braham, or any other part of the lands, was declared sufficient for all or for any of the different portions of the lands therein contained. 3. That the authority given by the Sheriff clerk to Mr. Cameron was sufficient to entitle him to sign the summons of removing, especially in the particular circumstances which rendered new summonses necessary, and that the practice of the Sheriff court did not require summonses to be signed on each page. 4. That the citations were perfectly regular, as being executed by a person who was furnished with the commission of a Sheriff's officer. It appeared that a first summons of removing had failed to be executed, in consequence of the officer being deforced, by the whole tenantry rising up and mobbing and assaulting him, under the impression that the landlord intended to extirpate them from the soil; whereas the fact was, he had offered them all a renewal of their leases at a small increase of rent, to which they would not agree.

April 16, 1802. The Sheriff pronounced this interlocutor: "The Sheriff having considered the libelled summons of removing, Hugh Innes, Esq. of Lochalsh, and John Mackenzie of Allan Grange, his commissioner, pursuers, against (the several tenants are here specially named), with the defences given in for them respectively by John M'Rae and Robert

“ Mackiel, procurators of court, of the same tenor and import,
 “ with the foregoing answers for the pursuers, instrument
 “ of sasine taken for Mr. Innes, and considered the disposition
 “ whereon the said sasine proceeded, (an extract whereof
 “ was produced to him), and the clause of dispensation in
 “ the crown charter, which is particularly disposed to the
 “ pursuer, whereby he was expressly authorized to take in-
 “ feftment upon the portions of land which were disposed
 “ at the manor place of the Castle of *Brahan*; and hav-
 “ ing also taken into consideration the circumstances stated
 “ in the answers, that those persons who are now defenders
 “ in the present action of removing, were actually decerned
 “ against to remove at the instance of Lord Seaforth and his
 “ commissioners preceding the term of Whitsunday 1801,
 “ and did continue in possession for the last year, in virtue
 “ of a set or tolerance by the present pursuer; in conse-
 “ quence of which he may fairly be considered as the last
 “ letter of the lands upon them, the Sheriff depute there-
 “ fore repels that part of the defence which rests upon the
 “ pursuer’s want of title to institute the present process of
 “ removing. And having further considered the objections
 “ stated by the procurators for the defenders to the copies
 “ of the summonses of removing upon which the citations
 “ against the defenders were made out, with the answers by
 “ the procurators for the pursuers to these objections, find
 “ that those regular formal summonses, made out and
 “ signed by the clerk of court, which were sent by a regular
 “ officer of court to be executed, who was maltreated and
 “ deforced by a lawless mob of persons, obviously connected
 “ with the defenders, who violently assaulted the officer and
 “ robbed him of his warrants, to the disgrace of the parties
 “ engaged in such a lawless proceeding, and the police of
 “ that district of the country where such an outrage was
 “ allowed to be carried on: and further, finds by the
 “ warrant produced under the hand of the clerk-depute of
 “ court, that Mr. Cameron, who did sign the summons, had
 “ such authority as was sufficient, in the circumstances of the
 “ case, to subscribe the said summonses; and still further
 “ finds, that it would be an encouragement to such lawless
 “ proceedings, if an objection which arose out of the illegal
 “ and unwarrantable conduct of the defenders, their friends
 “ and adherents, should militate in their favours; he there-
 “ fore repels the whole objections founded on any pretend-
 “ ed informality in the summonses or citations; and, in re-

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 " removal on the part of any individual defender, decess
 FINLAYSON, " against them all, in terms of the libel, to remove."
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On reclaiming petition, the Sheriff further pronounce
 this interlocutor:—" Finds there are many new facts stat
 " therein which were not formerly brought under his view
 " that the law respecting the necessity of taking the infe
 " ment upon the ground of the land disposed, and th
 " objections to the mode pursued in the present instanc
 " are more fully stated than in the papers formerly given i
 " He therefore repones the petitioners against the interl
 " cutor complained of, in so far that he allows them
 " improve the executions which are alleged to be false,
 " next calling, adheres to that part of the interlocutor co
 " plained of, which respects the formality of the summons
 " it being the customary practice in this court, for the Sh
 " riff clerk to sign only the last page of each summons, an
 " for the other reasons therein stated. He also repon
 " them against that part of the interlocutor complained o
 " which repels the defence founded upon the pursuer's
 " want of title; because, before finally determining on tha
 " point, he wishes the pursuer to produce Lord Seaforth's
 " or his commissioner's disposition to him, of the lands in
 " question, that he may therefrom judge whether the claus
 " of dispensation in Kenneth, Earl of Seaforth's charter
 " was actually disposed or not. And allows the pursuer to
 " state his view of the law upon the legality of the infe
 " ment taken at Castle Brahan, in answer to the within pe
 " tition, before finally advising the question, ordaining tha
 " if, at first calling of the cause, the defenders shall fail in
 " improving the execution whereon the action is founded
 " that then, before entering into any further defence, the
 " and all of them must find caution, in terms of law, within
 " the space of eight days from said calling, with certification
 " that if they fail, their other defences will not be listen
 " to."

Answers by the above interlocutor being ordered to be
 given in, and answers having been given in, the Sheriff again
 May 21, 1802. pronounced this interlocutor:—" Having considered the re
 " claiming petition, with the Sheriff's interlocutor thereon
 " of 30th April last, the proceedings in court of 3d May
 " the answers now given in to said reclaiming petition, an
 " within replies to the said answers, and having again con
 " sidered his several interlocutors of the 16th April, on the

“ different processes of removing, and which were reclaim-
 “ ed against, with the utmost attention, he, in the first
 “ place, refuses to allow the execution of the summonses to
 “ be improved, on the pretext that *Alexander Bain* was only
 “ a messenger at arms, and not a commissioned officer of
 “ court, undertaking the duty of a Sheriff officer to all in-
 “ tents and purposes, liable to the authority and regulations
 “ of the court, under whose authority and sanction he did
 “ act; the Sheriff therefore repels that ground of defence,
 “ as he also does that which respects the formality of the
 “ last executed summons, for the reasons stated in the
 “ interlocutor of 16th April; and having weighed and
 “ considered the objections stated to the pursuer’s title
 “ to prosecute the actions of removing, finds, first,
 “ That it is admitted, and not denied, that the hail pre-
 “ sent defenders were decerned to remove, as at the
 “ term of Whitsunday 1801; and that by their disclamation
 “ of the defences there made for them, they did completely
 “ acquiesce in that decree of removing. 2dly, That the sale
 “ of Lord Seaforth of the lands in question took place in
 “ January 1801, and that the defenders could not hold their
 “ possessions after Whitsunday through any right derived
 “ from his Lordship, and, of course, it could only be by
 “ tolerance of the succeeding proprietor, pursuer in the ac-
 “ tion of removing, that they did continue their possessions.
 “ And, 3dly, That the defenders, as holding their posses-
 “ sions from him, have no right to question the pursuer’s
 “ title, whether it be legally perfected by sasine or not;
 “ and therefore (without discussing the question of law as
 “ to the legality or formality of the sasine taken at Castle
 “ Braham, which he considers to be *jus tertii* to these de-
 “ fenders,) he adheres to his interlocutor of 16th April *in*
 “ *omnibus*, and decerns.”

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On advocation, Lord Glenlee refused to pass the bill. On July 20, 1802.
 second bill of advocation, the same was refused by the Lord
 Ordinary on the Bills, stating that he saw no reason for de-
 parting from the opinion of the Lord Ordinary in the former
 bill. Thereafter, a bill of suspension was presented, which met
 with the same result by the Lord Ordinary, and the Court. Nov. 20, 1802.

Against these several interlocutors the present appeal was
 brought to the House of Lords.

Pleaded for the Appellants.—The respondent has no title
 to sue, 1st. Because he is not the letter of the lands; these
 having been let by Lord Seaforth to the appellants, on a

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lease for nineteen years, of which many years are yet to run; 2d. Because the respondent has brought the present action as *heritable proprietor*, founding on his infeftment of the estate; but that infeftment gives him no right as heritable proprietor, because it is altogether null and void.

is not taken upon the ground of the lands conveyed to him but upon the ground of other lands not acquired by him. It was taken at Castle Brahan, upon lands still the property of the former proprietor. And this was done upon the principle, that a dispensation clause contained in a charter of union from the crown, authorized infeftment to be so taken; but this is a mistake, for it is fixed law, that when a vassal of the crown has executed his precept of sasine and is infeft, and afterwards divests himself of part of those lands, alienating them absolutely, the lands so conveyed become disjoined, are dissolved from the union, and therefore lose the benefit of the dispensation clause. Therefore, the infeftment, in this case, ought to have been taken upon the ground of the lands conveyed and severed from the others. Besides, the disposition from Lord Seaforth did not convey the dispensation contained in his Lordship's charter of union. On the contrary, it sets forth, that sasine is to be taken at the village of Audelve for the whole lands disposed, denominated the barony of Lochalsh; and the precept of sasine requires the bailies of Lord Seaforth to pass to the ground of the lands conveyed, and to give possession by delivery of earth and stone on the ground of the said lands. *Separatim*. The present action cannot be sustained, on account of the objections in point of form; 1st. The summons of removing was not subscribed by any clerk of court, but by a person having no valid commission, and acting as procurator for the pursuers in that very action. 2d. The summons was executed by a messenger at arms in the character of Sheriff officer, while he was not a Sheriff officer, and had no authority to act in that capacity.

Pleaded for the Respondent.—The respondent has an undoubted title, independent of the infeftment, to institute and carry on the removing against the appellants, as being the person under whom they held their possessions for the year subsequent to Whitsunday 1801. At this term of Whitsunday 1801 all connection between the appellants and Lord Seaforth entirely ceased; for, although they have attempted to deny this fact in the proceedings before the Court of Session, yet it is pointedly admitted in their pleadings before

the Sheriff, which they cannot now retract. In alluding to the action of removing raised by his Lordship against them, they state, that after defences were lodged, " they signed a disclaimer of the law proceedings, and a decree of removing passed against them of course." The old lease thus ceased, and they having procured a tolerance to for a year longer, the respondent was entitled to consider his right so to sit as being derived from him alone, because, by express contract, Lord Seaforth had conveyed to him all right which he had in the decree. If, therefore, his last year's possession was held under the respondent, they have no right to call in question his title to the lands, being established law, that a person from whom a tenant derives right, may insist in a removing against such tenant, though his title is so defective as not to sustain process if insisted against a tenant in other circumstances.

The respondent's title to insist in the processes of removing, as heritable proprietor, is equally unquestionable in regard to the infestment objected to as taken at Brahan Castle. The infestment was taken in precise terms of the authority and warrant contained in the title deeds assigned him by his author, Lord Seaforth. Even if the clause in the crown charter of 1781 had been a simple clause of union, it would have warranted the infestment at Brahan Castle. But, superadded to the clause of union, there is a clause of dispensation, in very special and comprehensive terms, which frees the question of all doubt. These two clauses must not be confounded, as the appellants attempt to do, but because they are distinct, and their legal virtues and effects not the same. Union is effected either by an express clause in a charter flowing from the crown; or by an erection of a barony, in which latter case union is implied without any special clause in the charter; and the effect is, to hold the lands comprehended within it, as one entire contiguous estate, although containing different tenements of land lying separate from each other. One sasine taken on any part, or the place mentioned in the charter, is good for the whole. In such case, of course, the moment a part of the united lands is sold, the union is dissolved as to those parts, and infestment must then be taken according to the usual form; but still it is in the power of the crown vassal to communicate the benefit of the union by a subaltern right; and, accordingly, this was expressly done in the present case. But, superadded to this clause of union, there is

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ii. tit. 6, p. 57.

1803. a special clause of dispensation, which entirely obviates the objection stated, arising from the dissolution of that union by selling a part, because such a clause, not resting on any such principles, is adapted to the event of the land's being disunited; and provides expressly that a sasine taken on any one part shall be sufficient for the whole, however locally separated. By the charter from the crown 1781, such infestment was authorized.

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The summonses of removing were in all respects regular and agreeable to the usage in the Sheriff courts. It has not been said that any objection lay to the original summonses which were subscribed by the clerk of court himself. The objections only apply to those which Mr. Cameron, acting under the authority of the clerk of court, has subscribed, after the Sheriff officer had been despoiled of those received from the Sheriff clerk, but the messenger who executed had a special commission to do so.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Wm. Alexander, Alex. Maconochie.*

For the Respondents, *Wm. Adam, Thomas Baird.*

NOTE.—Unreported in the Court of Session.

The Most Hon. JOHN, MARQUIS OF BUTE, and
HERBERT WINDSOR STUART, Esq., com-
monly called LORD HERBERT WINDSOR
STUART, second son of the said Marquis of
Bute, } *Appellants;*

The Hon. JAMES STUART WORTLEY, second
son of JOHN, late Earl of Bute, } *Respondent.*

House of Lords, 4th March 1803.

SERVICE — COMPETITION OF BRIEVES — ENTAIL — CLAUSE OF
DESTINATION — DEVOLUTION CLAUSE. — From the intermarriage of Sir George Mackenzie of Rosehaugh's family with the Bute family, Sir George executed an entail of his estate of Rosehaugh, and provided, that if one and the same person should happen to succeed both to his estate, and the Bute estate, then, in that case, if the person so succeeding should happen to have a second son, he and his heirs were taken bound to divide the Rosehaugh estate in favour of such second son. A cadet of

the Bute family succeeded to both estates, and had several sons. His eldest became third Earl of Bute; and his second son, James Stuart, afterwards Lord Privy Seal, succeeded to the Rosehaugh estate. The Lord Privy Seal died in 1800, without issue. His elder brother John, had died before him in 1792, leaving several sons, John, now fourth Earl of Bute (and first Marquis), and James Stuart Wortley, the respondent, and others; but when the Lord Privy Seal died in 1800, John, the fourth earl, had also several sons; and the question was, Whether, according to the construction of the destination of the entail, the second son of the third earl, or the second son of the fourth Earl of Bute, was entitled to succeed to the estate of Rosehaugh. Held, that the second son of the third Earl was entitled to be preferred, as the person nearest to the maker of the entail. Affirmed in the House of Lords.

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Sir George Mackenzie of Roschaugh was twice married. By his first wife he had two daughters, Agnes, married to James Stuart, hereditary Sheriff, and afterwards Earl of Bute, and Elizabeth, married first to Mr. Cockburn of Langton, and secondly, to Sir James Mackenzie, Bart. By his second wife Sir George had issue—one son, George.

In these circumstances, Sir George made a settlement of June 4, 1639. his estates under a strict entail, whereby they were conveyed to his son George, and the heirs male of his body; whom failing, to the heirs male of his own body; whom failing, to any person, or persons, that he (Sir George) had then, or should thereafter nominate and appoint to be heirs of tailzie to succeed to his estate, failing heirs male of his son's body, or of his own, by any writing under his hand.

Accordingly, of this same date, Sir George executed a deed of nomination, which, after reciting generally the deed of entail, proceeded thus:—

“And being now resolved to condescend upon the persons whom I design to succeed to my lands, heritages, and other estate, failing heirs male of my said son's and my own body. Therefore, and in regard that I have sufficiently provided the daughters of my first marriage, and that the greatest part of my estate has been conquest by me since my marriage with the said Dame Margaret Haliburton, my present spouse, Wit ye me to have nominated, designed, and appointed. Likeas I, by these presents, nominate, design, and appoint, to succeed to my lands, baronies, teinds, and all other heritage whatsoever, particularly and generally mentioned in the foresaid disposition and assignation, the heirs female lawfully to be procreate of the body of the said George Mackenzie, my son, the

1803. " eldest heir female always secluding the rest, and succeeding without division, and the heirs male to be procreated of the said heir female her body ; which failing, the heirs female to be procreate of her body ; which failing, the heirs female to be procreated betwixt me and the said Dame Margaret Haliburton, my spouse, the eldest heir female secluding the rest, and succeeding without division as said is ; which failing, the heirs female to be procreate of my body in any other lawful marriage, the eldest always secluding the rest, and succeeding without division, and the heirs male to be procreate of the said heir female her body ; which failing, the heirs female to be procreated of her body."
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- No. 1. Then follow limitations to the issue male of his daughters in the following terms :—" Which failing, the *second son* to be procreate, or to be procreate, betwixt Agnes Mackenzie my eldest daughter, spouse to James Stuart, Sheriff of Bute, and the heirs male of that second son's body which failing, the third son lawfully procreate or to be procreate of her body, and the heirs male of her body which failing, the *fourth and remanent sons* to be procreated of her body, and the heirs male of their bodies, in order after others, according to the priorities of their births."
- No. 2. " Which failing, the *second son* to be procreate or to be procreate of Elizabeth Mackenzie, my second daughter, spouse of Archibald Cockburn, younger of Langton, and the heirs male of that second son's body ; which failing, the third son to be procreate of her body, and the heirs male of her body ; which failing, the *fourth and remanent sons* to be procreated of her body, and the heirs male of their bodies in order after others, according to the priority of the births."
- No. 3. " Which failing, the eldest or only son to be procreated or that shall be procreate of the said Agnes Mackenzie Lady Bute, my eldest daughter ; and failing of him by death, his *second son*, and the heirs male of the said second son's body ; which failing, the *third and remanent sons* of the said eldest or only son, and the heirs male of their bodies, *successive*."
- No. 4. " Which failing, the eldest and only son to be procreated, or that shall be procreate, of the said Elizabeth Mackenzie, Lady Langton, my second daughter ; and failing of him by death, his *second son*, and the heirs male of the said second son's body ; which failing, the third and remanent sons of the said eldest or only son, and the heirs male of their bodies, *successive*."

Then followed the limitation, on the construction of which the present question of competition arose.

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“Which failing, the eldest son of my eldest daughter’s eldest son, and his sons, and male descendants of the masculine line, without interruption of female, in manner and according to the order above written; which failing, the eldest son of the said eldest son of my second daughter, and his sons and male descendants of the masculine line, without interruption of female, in manner and according to the order foresaid; the second and other younger sons, and the heirs male of their body, succeeding to my said estate *successive*; and *they failing*, the eldest succeeding in the last place, and his second and other sons, and their foresaids, in the order above specified, from time to time, so long as there shall be any sons or male descendants of my said daughters to succeed to my estate.

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WORTLEY.
No. 5.

“And which all failing, Simon Mackenzie, only lawful son to the deceased Simon Mackenzie, my brother german, and the heirs male lawfully to be procreated of his body; which failing, to Mr. Colin Mackenzie, advocate, one of the commissaries of Edinburgh, my brother german, and the heirs male lawfully procreate, or to be procreate, of his body; which failing, the said George Mackenzie, my son, his other nearest and lawful heirs male whatsoever, which all failing, his heirs and assignees whatsoever.”

No. 6.

“With and under the provisions after specified; viz. in case it shall happen the second sons of my eldest or second daughters, or their descendants, to succeed to the estate of Bute or Langton *respective*, or if my estate shall fall to either of their eldest sons, according to the substitution and order of succession before mentioned, then, and in these cases, or any of them, and for the preserving of my estate entire and distinct, without confounding with theirs, it is hereby provided, That when one and the same person shall happen to succeed both to my estate and the Sheriff of Bute’s, or to Langton’s, then, and in that case, if the person so succeeding have a second, or shall happen to have a second son, he and his heirs shall be holden to denude themselves of my estate in favours of the said second son, and the heirs male of his body; which failing, to the other heirs male and of tailzie, in manner and according to the order above written.”

“Likeas, in the case foresaid, when my estate, and one of the other estates shall fall, and be settled on one and the same person, it shall be lawful to the second or younger

1803. " son descending of the person succeeding to both the
 " estates, to obtain themselves served, retoured, and i
 THE MARQUIS " in my estate, contained in the foresaid letters of dispo
 OF BUTE, &c. " and assignation, as heirs of provision thereto, and the
 v. " son succeeding to both the said estates, his right, re
 THE HON. J. " and infetment of my estate shall become void and es
 STUART " as if it had not been.
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" And, further, with this express provision, that if
 " eldest daughter shall have no second or younger son
 " the estate would fall to him, and if my other daug
 " shall have a second son for the time, in that case the e
 " shall fall to the second or younger son of either o
 " daughters who shall exist for the time ; and if thereb
 " estate shall fall to the second or younger son of m
 " cond daughter, in that case he shall have right to
 " said estate, and to the mails, profits, and duties the
 " ay and while the existence of a second son of my el
 " daughter, and upon whose existence he shall be ho
 " to denude in favours of the said second son of my el
 " daughter, and his heirs of provision, according to
 " order contained in this nomination, and always unde
 " reservations," &c.

1692. Upon the death of Sir George Mackenzie, the entail
 deed of nomination were registered in the register of
 zies ; and George Mackenzie, his only son, the insti
 made up his titles to the estate in terms of these d

1707. George Mackenzie died in 1707 without issue, and the
 the succession opened to the issue of Sir George Mac
 zie's daughters, Agnes and Elizabeth.

Agnes, Countess of Bute, had issue only one son, Ja
 called Lord Mountstuart, who afterwards became the se
 Earl of Bute.

1708. On the death of George Mackenzie, son to Sir Ge
 Lord Mountstuart took out a brieve from Chancery to
 himself heir of tailzie to his grandfather, Sir George.
 was opposed by Sir George's second daughter, Mrs. E
 beth Cockburn of Langton, then recently married to
 James Mackenzie, Bart., on the ground that, by the e
 her second son was preferable to Lady Bute's eldest
 only son, and therefore, that Lord Mountstuart could n
 served till it should be certain whether Lady Macke
 should have a second son or not. The Court of Ses
 however, unanimously found that Lord Mountstuart was
 titled to proceed in his service.

But Lady Mackenzie, having soon after been delivered

a second son, George, a process was brought in his name, and in name of his father, concluding for reduction of that service, and for having it found that Lord Mountstuart was bound to denude in favour of this second son.

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The Court of Session, of this date, found that Lord Mountstuart was bound to denude in favour of such infant son. A reclaiming petition was presented; but before it was disposed of, the infant son of Lady Mackenzie having died, a fresh petition was presented, stating this fact, and of course the estate remained in Lord Mountstuart as before.

On his father's death, of this date, he became the second Earl of Bute, and succeeded to these estates, both of Bute and Sir George Mackenzie, and enjoyed them until his death in 1722.

Dec. 13, 1709.
1710.

He had two sons, John, the respondent's father, afterwards the third Earl of Bute, and the late James Stuart Mackenzie, afterwards Lord Privy Seal. And, in terms of the entail of the Mackenzie estate, he was bound to denude himself of that estate in favour of James Stuart Mackenzie, his second son. But somehow or other he was allowed to possess both estates until his death in 1722, when he was succeeded in his honours and estate of Bute by his eldest son, John.

The second son, James Stuart, then Lord Privy Seal, succeeded to Sir George Mackenzie's estate, and completed titles under the entail, and held and possessed his estates until his death in 1800.

The Lord Privy Seal was married to Lady Elizabeth Campbell, daughter of John, Duke of Argyle and Greenwich. There was no issue of this marriage. John, then Earl of Bute, his elder brother, had died in 1792, leaving several sons, John, now Earl and Marquis of Bute, the Hon. James Stuart Wortley, the respondent, and second son of the said third Earl, and other younger sons.

But when the Lord Privy Seal died in 1800, the then Marquis of Bute (fourth Earl) had also several sons; and the question which arose was, whether Sir George Mackenzie's estate should go to the second son of the third Earl of Bute, or to the second son of the fourth Earl, now Marquis of Bute, who was Lord Herbert Stewart, one of the other appellants.

It seems that the Lord Privy Seal had executed various deeds in regard to his estates, whereby he adopted the destination in the entail of Sir George Mackenzie, and, it was alleged, manifested a conviction that the respondent was the heir of entail entitled to succeed to him, failing the heirs

1803. of his own body, under the last of which he was called
 under the description of second son to the last Earl of Bute
 Thus, the Lord Privy Seal having paid off and taken co-
 veyances, in the name of trustees, to certain debts owing to
 Sir George Mackenzie at his death. His Lordship, of the
 date, executed a discharge of these debts in favour of the
 respondent nominatim, and the other heirs of entail. After
 enumerating the debts and conveyances, and his intention
 of relieving the estate of these burdens, he adds, "There-
 fore, and for the love, favour, and affection I have and
 bear to the Hon. James Stuart Wortley, my nephew,
 second son of the deceased John, Earl of Bute, my brother
 german, and *presumptive heir to me* in the said or
 tailed estate, and for the regard I have to the other heir
 of entail," &c., and therefore discharges, &c.

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In the application made to the Court of Session, Lord
 Bannatyne and Balmuto were appointed assessors to the
 macers, in deciding upon the merits of the question which
 might be stated to them in the competition of briefs; and
 parties having been heard by counsel, the macers, by the ad-
 vice of their assessors, made *avizandum* to the Court, and
 appointed the parties to give in informations upon the
 merits of the question in dispute.

On advising these, and the arguments of parties, the
 Dec. 3, 1801. Court unanimously pronounced this interlocutor:—"Upon
 report of Lord Bannatyne, one of the assessors in the com-
 petition of briefs presently depending before the macers
 purchased from His Majesty's Chancery, by each of the
 Honourable James Stuart Wortley, second son of John,
 the last Earl of Bute; the Most Noble John, preser-
 Marquis of Bute; and the Right Honourable Herbert
 Windsor Stuart, commonly called Lord Herbert Stuart, a
 second son of the said Marquis, for being respectively serve
 heir of tailzie and provision to the Right Honourable the
 late James Stuart Mackenzie of Rosehaugh, Lord Privy
 Seal of Scotland; and having advised the information
 given in for the said Marquis of Bute and Lord Herber-
 Stuart on the one part, and for the Honourable Jam-
 es Stuart Wortley on the other part, the Lords find that the
 succession in question devolves upon the said Jam-

* LORD PRESIDENT CAMPBELL said,—“This case arises out of a
 construction of the terms of a destination of succession. The true and
 probable meaning of the terms used in the deed favours Mr. Stuart
 Wortley's claim; for the maker of the tailzie, by using the words—

“ Stuart Wortley, and therefore remit to the macers to pre-
fer his claim in the competition, and to proceed in his
service accordingly.”

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Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellants. The succession must be regulated by what appears to have been the intention of Sir George Mackenzie, in a case, or under circumstances, like the present, and that intention must be gathered from the scope and terms of the deed of nomination alone. The respondent, in the Court below, attempted to bring, in aid of that construction which he contended for, the opinions said to have been entertained by members of the family and others; and the terms of certain deeds executed relative to the estate by the late Mr. Stuart Mackenzie. But the appellants trust that such extraneous and irrelevant matter will not be introduced here; or, if it is, they are confident it will be disregarded by your Lordships.

The words of limitation in the deed itself must be alone looked to; and the words of limitation, under which one of the present parties must take the estate, or be served heir, are, “The eldest son of my eldest daughter’s eldest son, and his sons and male descendants of the masculine line, without interruption of female;” a description directly applicable (in the course of events) to the late Earl of Bute and his family. But the late Earl having died before the succession opened, the limitation is confined to his sons and male descendants; and the question is, which of them must take?

The sons and male descendants of a certain person in the destination of real estate, is precisely synonymous with the more technical phrase of the heirs male of the body of that person; and were there no more in the limitation or deed in question, the appellant, the Marquis, would unquestionably both take and keep the estate, as the heir male of the body of the person described. He trusts it will appear that the additional words in the limitation cannot prevent him from taking. Whether he is entitled to keep it, is a separate question, depending on the after condition, which imposes an

‘sons,’ and ‘sons of sons,’ seems to have a predilection for those nearest to himself, rather than those whom the law prefers. Yet if the question had not occurred until another generation had become extinct, there would have been great difficulty.”

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obligation on those who possess the family estate of Bute and who, at the same time, have more sons than one, divest themselves in favour of the second son, but under no such obligation in favour of any other person.

The respondent says that the limitation is not simply the sons and male descendants of Sir George Mackenzie's eldest great grandson by his eldest daughter, but to sons and male descendants, *in manner, and according to an order before written*; and, referring to the prior limitation, he says, the order alluded to was, that the younger, or second sons of the person described should take in preference to the eldest.

But this construction rests upon two fallacies: 1st. taking the case precisely as it has occurred, and supposing the limitation descriptive of the late Earl of Bute, and his immediate issue male, just as if he and they had been named. 2dly. In taking the word sons only, and sinking the more comprehensive term male descendants. The maker of the deed, in limiting the estate to the eldest branch and main stock of the Bute family, after a variety of substitutions or remainders should be exhausted, must have had it in view, that when the succession opened (if it ever did), there might, and probably would be, several or many generations or branches existing, all sprung from the same stem. It could not then be his meaning that, in such a case, the Rosehaugh estate should go to a remote (perhaps an obscure) cadet of the Bute family, in preference to the actual representative of that family and his sons, unless he was guided by singularity and whim, which is not to be supposed. Without going out of the deed, the term used, male descendants, seems decisive of the intention. The estate to vest in the heir male or representative of the family, subject to an obligation of divestment in favour of his second son, if he had, or should come to have one. It will be observed, that, in the former substitutions, the word sons only is used, evidently because the maker of the deed could with certainty state the ramifications at that early stage; but when he comes to the more distant, the term is, sons and male descendants.

If the late Earl of Bute had survived his brother, Mr Stuart Mackenzie, it is indisputable that he would have taken the Rosehaugh estate under the limitation "to the eldest son of Sir George Mackenzie's eldest daughter: the eldest son," and he would have been entitled to keep it but for the operation of the condition attaching on the

who held the Bute estate at the same time. For it will be attended to, that the exclusion from the Rosehaugh estate, or obligation to give it up, is not in respect of being the representative of the Bute family, but in respect of being the holder of the Bute estate; so that if this latter estate had been out of the family, or out of the person of the last Earl, he would have been entitled to retain the Rosehaugh estate so long as he lived. If such was the condition, or the right of the late Earl, it seems impossible to figure a difference in the condition and right of the present Earl, the appellant, who stands in the place of his father; and, being his heir and representative, is, without any forced construction, the person entitled to take, under the limitation in question.

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Even if it were allowed that the words annexed to the limitation in question, which the respondent relies on, make out the proposition, that in every case of there being two or more brothers, descendants of the tailzier's daughters in the male line, the second and younger are preferable to the eldest; or, in other words, that the eldest must rank as if he were the youngest, which is the utmost length the words can go, still it does not determine the question, Whether, in the case of there being two or more generations of male descendants from the tailzier's eldest great grandson, when the succession opens to them by the failure of the younger branches of the family, is the second son of the *last*, or the second son of the *first* holder of the Bute estate, the person favoured, or who was intended to take the Rosehaugh estate? The appellants flatter themselves that it must appear that there is nothing in the words used to confine the meaning to the *earliest* generation; that it is more natural or reasonable to construe them to mean the *latest*, and that this construction does the least violence to the legal course of succession.

2. Independently of the words used in the limitation, the meaning is to be collected from other parts of the deed. From the whole, it is perfectly clear that Sir George Mackenzie's object was to vest his estate, failing issue male and female of his second marriage, or the *nearest cadet* of the Bute family, and so favour that family, as far as was consistent with another object, viz. that of making a distinct family to represent his own. It runs through the whole deed that he was chiefly guarding against *his estate* and the *Bute estate* being held by the same person. If that was impossible, by his having no person to represent him but the

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holder of the Bute estate, the provision is, that the representation should so continue till the head of the Bute family had a second son. In the case of the estate going to the younger branches of the Langton family, because of there being no younger branches of the Bute family at the time, the provision is, that immediately on the existence of a second son of Bute, the holder of the Langton family shall divest himself. And another case deserves the greatest weight, as proving what the tailzier meant by the substitution in question, because it is impossible but it must have occurred to his mind. A second son of the Bute family might take the estate, and then become the representative of Bute, by the failure of his elder brother without issue male; the second son who took might have younger brothers; and, according to the respondent's hypothesis, the Rosehaugh estate ought to have been directed to pass to those younger brothers. But there is no such direction in the deed. The direction is, that if the person so taking and becoming possessed of the Bute estate, has a second son of his own body, he shall divest himself of the Rosehaugh estate in favour of that second son; but if he has no second son, he shall keep the estate, along with that of the Bute, till one exists. Not a syllable of the brother's taking appears, or a preference of the younger branches of the first generation to the younger branches of the second or later generations.

Pleaded for the Respondent.—The question between the parties comes to a very short and simple issue. There are no difficult points of law to be discussed; there are none of those perplexing ambiguities which sometimes occur in deeds containing long substitutions; there is no occasion even to resort to any of those rules which lawyers have laid down for discovering the meaning of a testator, where doubtful. The distinguished and eminent person upon whose deed the present question arises, as he was fully able, so he has, in the branch of the substitution now under consideration, expressed himself with such clearness and precision, as to leave no room for serious doubt. Indeed the respondent cannot but admire the ingenuity discovered in forming any thing that wears even the smallest semblance of an argument on the other side.

As the heirs male of George Mackenzie, the entailor's son, and of Sir George Mackenzie himself, called by the original deed of entail, have failed; as the heirs female of the body of George Mackenzie and of the marriage between Sir

George and Dame Margaret Haliburton, his second wife, called by the first clause of the deed of nomination, have also failed; as the second, third, fourth, and remanent sons of Sir George's two daughters, and the heirs male of the bodies of these sons, called by the next clause in the deed of nomination, marked No. 1, have likewise failed, as well as the heirs called under the clause No. 2; James, second Earl of Bute, the only son of Agnes Lady Bute, succeeded, and, after him, his second son, the late Lord Privy Seal; but he having died without heirs male of his body, and there having been no third or younger sons of James, second Earl of Bute, and Mrs. Cockburn's sons having also failed, the substitutions in this last clause, as well as in the former ones, came to an end, and were completely exhausted, and of consequence the person called in the clause No. 3, must succeed to the estate; so that the only question is, Who is the person called by that clause? Which is, in these words, "which failing, the eldest son of my eldest daughter's eldest son, and his sons and male descendants of the masculineline without interruption of female, in manner and according to the order above written." When this is taken in conjunction with the clause No. 4, declaring that "the second and other younger sons, and the heirs male of their body, succeeding to my estate successive; and they failing, *the eldest succeeding in the last place*, and his second and other sons and their foresaids, in the order above specified, so long as there shall be any sons or male descendants of my said daughter's to succeed to my estate;" there can remain no doubt, it is humbly conceived, of the respondent's right to succeed to the estate.

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Although, by the clause in the deed No. 3. to the eldest son of the eldest daughter's eldest son, and his sons and male descendants, the late Earl of Bute, if he had survived his younger brother, the Lord Privy Seal, might have succeeded, yet he would have done so under an obligation contained in the clause No. 5, to denude in favour of his second son, the respondent; but the late Earl having predeceased, the succession of consequence opened to his sons, a term which no doubt may be descriptive both of the Marquis of Bute, the appellant, and of the respondent. But, in order to discover what was thereby intended, it is proper first to consider the expression merely by itself, and, secondly, to take it in conjunction with the other parts of the clause in which it is introduced.

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Sir George Mackenzie was no stranger to the style of deeds of settlement, or to the technical language uniformly used in them. If he had meant that the eldest son, or eldest male descendant of the eldest son of his daughter's eldest son should succeed, it is impossible to suppose that he would not have made use of the common technical expressions, so familiar to him, as well as to every lawyer and conveyancer much less experienced in matters of this kind, namely, the *heir male of the body*; and this observation derives additional force from the circumstance that, in the preceding branches of the substitution, where Sir George did mean to call the eldest son, he never failed to make use of the proper and ordinary technical term; for example, in the clause No. 1. the estate was given to the second son procreated or to be procreated between Agnes Mackenzie and the heirs male of that second son's body; which failing, the third son lawfully procreated, or to be procreated of her body, and the heirs male of his body, and so on invariably in every one case without exception, where the eldest son was in view. But, on the other hand, where Sir George did not mean to call the eldest son exclusively, or under the character of heir male of the body, he used the very same expression as in the present case. Thus in the clause No. 4, after pointing out the order of succession, he adds, "so long as there shall be any sons or male descendants of my said daughters." At any rate, if Sir George intended to depart from the established technical language in a deed so important, and to him so interesting, it is unquestionable that he would have used the obvious phrase, which was equally expressive of his meaning, viz. the eldest son, or eldest male descendant. Nothing was further, however, from Sir George's intention than such a course of succession. Every line of his deed of nomination shows, in the clearest manner, that its leading object, and the most anxious purpose of the granter, were to call the younger sons in preference to the eldest. Even the younger sons of his youngest daughter were called in preference to the eldest son of his eldest daughter, and, indeed, the eldest son is never allowed a place in the succession while there is another male descendant to compete with him; and when the eldest son is thus admitted in some measure from necessity, he is allowed to hold the estate no longer than till he has a second son. As soon as such second son exists, he is entitled to call upon his father to denude in his favour, or to take

ate independently of his father, if he should decline
ude.

igh, therefore, the matter rested upon the expres-
ns and male descendants, the respondent would hold
stination to be clearly in his favour; but Sir George
ren care not to leave the matter upon that footing;

he did not intend, where there was more than one
at the eldest son should succeed, not satisfied with
; use of another expression than heirs male of the
or eldest son, and adopting that of sons and male
dants in the masculine line, he was anxious to point
e order in which those sons, or male descendants,
to succeed. He did so, accordingly, by adding, *in*
r and according to the order above written. But Sir
e was not satisfied even with a general reference to
der of succession laid down in the preceding clauses,
er clear that might seem: for, to obviate every possi-
of doubt, or room for question, he further declared,
most pointed and direct terms, what the order was,
ling “the second and other younger sons, and the
; male of their body succeeding to my said estate
essive: and they failing, the *eldest succeeding in the*
place, and his second and other sons, and their fore-
s, *in the order above specified*, from time to time, as
; as there shall be sons or male descendants of my
s daughters to succeed to my estate.” The result of
submitted to be indisputably in favour of the respond-
for though both the appellant and he were sons of the
son of the eldest son of Agnes Mackenzie, Lady Bute,
being declared that the second must take first, and
t was only failing him, and the heirs male of his body,
his younger brothers, and the heirs male of their
s, that the eldest, that is, the Marquis, could take;
onclusion in favour of the respondent seems in no de-
nore fallible than if he had been called by name.

er hearing counsel, it was

lered and adjudged that the interlocutor complained
f be, and the same is hereby affirmed.

ie Appellants, *Samuel Romilly, Wm. Alexander.*

he Respondent, *Sp. Perceval, Wm. Adam, Charles*
Hay, J. H. Newbolt.

NOTE.—Unreported in the Court of Session.

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SIR WILFRED LAWSON, Bart., Cumberland, Executor under the Will of Mrs. Aglianby or Lowthian, } *Appellant*
JOHN MAXWELL, Esq., and Others, Representatives of Richard Lowthian deceased, } *Respondent*

House of Lords, 7th April 1803.

INTEREST—HOW CHARGEABLE—BONA FIDES—TERCE—BURGAGE
—1st. A widow, in accounting for the estate of her husband, at funds of which were administered to, and uplifted by her, was held liable in five per cent. interest from the date when the sums were uplifted, although she had intromitted in *bona fide*, and under an absolute conveyance of the husband's whole real and personal estate, which was reduced. 2d. Also held her liable, at the same rate of interest, for all rents recovered, or which ought to have been recovered. 3d. Held that her terce could not extend over that portion of her husband's heritable estate which was held burgage.

The late Mr. Lowthian had estates both in England and Scotland. Before his death he executed deeds, leaving both the English and Scotch estates to Mrs. Aglianby or Lowthian, his wife, cutting off his heir at law, George Ross, his nephew, with an annuity of £50. After her husband's death, she entered into possession of both estates, and enjoyed therents thereof for several years, paying the annuity of £50 to George Ross, the heir at law, without any exception or even hint against the validity of the deeds. Thereafter, however, the trustees of George Ross, (who was in bankrupt circumstances,) sued out a reduction of these deeds, the result of which is reported, ante vol. iii. p. 365, where it is shown that they were successful in setting them aside.

They then raised the present action of count and reckoning, concluding "that Mrs. Aglianby or Lowthian should be decerned to make payment to them, as trustees foresaid, of the sum of £20,000 Sterling, as the amount of bygone rents of the said lands and others, and the interest thereof since the same was intromitted with by her; and also decerned to make payment of £40,000, as the amount of the other heritable and personal estate pertaining and belonging to the said Richard Lowthian, and intromitted with by her, and the interest thereof since the same was intromitted with by her."

By order of the Lord Ordinary, she lodged a state of her management and intromissions, in which she specified the sole rents drawn from the English and Scotch estates, and debts due to Mr. Lowthian in either kingdom. She did not make any deductions from the amount on account of her own claims of terce, as, until it was previously determined whether certain subjects in Dumfries, &c., were held burgh or not, these could not be properly ascertained.

The whole of Mr. Lowthian's settlements of the Scotch estates in her favour being set aside, she claimed both her terce and *jus relictæ*. Separate questions arose as to each of these, viz. as to the first, assuming Mr. Lowthian's English settlements unchallengeable, Whether her acceptance of these English estates operated as a discharge of her terce over the Scotch estates, in virtue of the act 1681, c. 10. Vide ante Vol. iii. p. 621. As to the second, Whether the obligation granted by Mr. Lowthian, for payment of George Mackenzie's debts *per versionem*, constituted a moveable debt, which affected the *jus relictæ*, and must be deducted before that *jus relictæ* could be claimed.

The estate of Netherwood, in Scotland, belonged originally to George Mackenzie, who was insolvent, and Mr. Lowthian was his principal creditor. The manner in which he acquired Netherwood was by a transaction with the trustees of George Mackenzie, by which, in consequence of their conveying to him the estate, he became bound to pay all his creditors their debts as the price of the estate.

In regard to terce, the Court found her not entitled to it and also the English estates. The Court also found that the obligations granted to Mr. Lowthian to the trustees of George Mackenzie for the price of the estate of Netherwood, and debts owing by George Mackenzie, being of a revocable nature, must affect the *jus relictæ*. But, on appeal, the House of Lords reversed as to the terce, holding her entitled to her terce over the Scotch estates as well as her provision out of the English estates; but affirmed as to the second *jus relictæ*. By a previous interlocutor in the same question, she had been found liable to account with interest; and the only question which remained was as to this accounting. Two questions were agitated; 1. From what time, and at what rate, should Mrs. Lowthian be charged with interest, and whether at the rate of five per cent. upon each sum she uplifted at the time she received it? 2d. Whether her terce over Netherwood estate (although the whole

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was possessed *pro indiviso*, yet part ran through the burgh of Dumfries), was limited to parts held fee or blench, and did not extend to the other portion of the estate, which, was alleged, was held burgage?

In regard to the first point, it was contended that Mrs. Lowthian had possessed under an absolute conveyance, vesting the subjects in her for her own behoof. As things then stood, no other party was interested. She could not consider herself responsible to any one, and supposed herself at liberty, not only to receive the funds in what manner, and at what time she pleased, but also to dispose of them as she pleased. Not having had a whisper as to their invalidity, she, in the worst view, must be looked on as a *bona fide* possessor. If so, she was not liable for the fruits, far less the interest of the rents. She did not obtain these deeds by fraud, and though reduced, yet they were not reduced on that ground. If liable then for interest at all, it can only be for bank interest, or interest at three per cent.

As to the second point of terce, the respondent having argued that if terce was due out of the estate of Netherwood, it must be restricted to the portion held feu or blench of the crown, and could not extend to the other portion *within the territory* of the burgh of Dumfries, and *held by burgage tenure*. The appellant answered, that, in point of law, the rule that the terce is not due out of burgage tenements, is founded, not upon the situation or nature of the subject, but upon the tenure or holding.

Lord Glenlee, Ordinary, reported the case to the Court, June 12, 1801. who, of this date, found " the defenders liable to account to
 " the pursuers for interest on principal sums, from the time
 " the same were uplifted by Mrs. Lowthian, at the rate of
 " five per cent. : Find them also liable in interest at the same
 " rate, for the interests and rents uplifted by her, or which
 " ought to have been recovered by her ; and that from and
 " after one year after the said rents and interests became due,
 " or might have been recovered ; repel the objections stated
 " to Mr. Lowthian's infestment, and find Mrs. Lowthian was
 " entitled to her terce out of the lands in which she stood in-
 " feft, in so far as the same did not hold burgage; but find
 " that the terce does not extend to lands holding burgage;
 " and remit to the Lord Ordinary to ascertain the extent of
 " the lands so holding burgage, and the amount of the rents
 " thereof. And also find the defenders are not bound to
 " account to the pursuers for the rents uplifted under Mr.
 " Lowthian's English will, out of the estate of Stafford, and

applied in extinction of the debt due by George Ross to Mr. Lowthian, and remit to the Lord Ordinary to proceed accordingly, and to do further as he shall see cause." In reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

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July 2, 1801.

Pleaded for the Appellant.—(1.) On the point of interest. The order that she shall be charged with interest at the highest legal rate, on all principal sums from the time she received them, and at the same rate upon rents and interests from the lapse of a year after she received or might have received those, is, under all the circumstances, most rigorous, and, it is apprehended, not founded either in law or equity. For the space of four years after her husband's death, she considered, and was entitled to consider, the residue of his property, after payment of debts and legacies, as her own absolutely; and, consequently, there was no call upon her either to sue the debtors to the estate, or to lay out what she received at interest, or to the best advantage. Neither could she conceive herself under any obligation to keep regular accounts; and this is an ample excuse for her not being able to show precisely when she received or how she disposed of the money during that period; and yet she is by the decree to be charged with five per cent. from the amount she received principal sums, and from a year after the time it is supposed she might have received, or recovered rents and interest. It is obvious that even if she had been inclined to make the most of the money, it was impossible for her to obtain securities bearing five per cent. interest with such promptitude. Had she been able to show what interest she actually drew, it is umbly apprehended that she could not, in equity, have been liable for more; and as no gross negligence or fraud is imputable, the appellant conceives that some medium ought to be struck, and that three per cent., or the rate which it would have yielded, if lodged in bank, ought only to be allowed. (2.) On the point of terce and burgage tenure. By our ancient law, burgage subjects were not exempted from the terce. But, since Craig's time, they have been so. But this has only reference to separate tenements, and to tenements in burgh, and not to rural subjects in lands, far less to part of a large estate, which, for the greater part, is commonly held feu or blench of the crown. The lands in question are not held by burgage tenure. Though a charter granted by the magistrates of a burgh as superiors, and

1503. they grant entries to vassals, this does not prove the subject is held burgage. The reddendo alone rules and decides this, indicated by the usual badge of watching and warding. The burgh in general holds of the king; and every burgage tenant is the king's immediate vassal; for though the magistrates give the entry, it is not as superiors but as bailies of the king. On the other hand, the distinguishing badge of feu holding is the reddendo in money; and it is a settled point, that property held feu, though of a burgh, is subject to the widow's terce. Houses in the very centre of a burgh may, and are very often held feu, and not burgage. It is not the situation, therefore, but the tenure, which exempts them. Now the lands of Netherwood are not comprehended within the royalty of the burgh of Dumfries, and therefore cannot be held burgage. They are not named nor described in the town's charter. The magistrates have never pretended to exercise jurisdiction over the inhabitants of that part of the estate which is held of them; and the whole estate is valued and rated in the county books, and pays all taxes as situated there, and not in the royal burgh. And, lastly, the title deeds prove this a feu and not a burgage holding.

Pleaded for the Respondents.—In regard to the interest. It has already been determined, in the former litigation, and by the interlocutor of 6th February 1796, and the point is now at rest, that Mrs. Lowthian's representatives are responsible for interest on the different sums belonging to the respondent, and intromitted by Mrs. Lowthian, after the death of her husband. It does not seem seriously disputed that the terms or periods from which interest is decreed to be paid, are justly and fairly fixed. Nay this seems admitted in the Court below; and really, in fixing those periods, and in making a distinction between principal sums and the interest chargeable on rents and interests from twelve months after they became due, every indulgence has been shown her, obviously with the view of giving her the utmost latitude to recover these. The only point here, therefore, is the rate or amount of interest chargeable—the appellant contending that the legal rate of interest is exorbitant and unjust in the circumstances. The principle adopted by the Court below was, that Mrs. Lowthian was to be viewed as an executor or administrator acting in the affairs of another, and subject to all the strict rules applicable to such cases. She was liable as a *negotiorum gestio* is, or as a tutor is, and this being the case, and not seriously denied, the rates of interest charged are agreeable to the general principles.

d therefore unexceptionable. 2. With regard to the
 ree, before deciding this, it is necessary to see by the
 des whether the subjects alleged to be burgage be really
 id truly held of that tenure. It is clear, both by the titles
 id by the authorities, that the part of Netherwood within
 e burgh of Dumfries, can be considered as no other than
 olden burgage. They appeared in some writs to be held
 the king, sometimes of the magistrates, as the king's
 ilies, but both for the services of the burgh used and
 ont. At another time, a small sum of money, or feu-duty
 as exacted as payable to the town treasurer "for the use
 the burgh," and performing other burgal services "used
 id wont." And, looking to the tenure of the subject, and
 it to the *nature* of the property, it is clear that the subject
 question is burgage, and therefore not liable to terce.

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SIR WILFRED
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After hearing counsel,

The LORD CHANCELLOR ELDON said—

"This is an appeal from the Court of Session, (states the question
 being one of accounting between the parties. Interlocutor, June
), 1801, read; and reclaiming petition and prayer read, by which
 e party sought to be reponed against that interlocutor).

"The appellant mistakes as to the effect of this interlocutor. It
 ly finds, in general terms, that the terce does not extend to lands
 olden burgage; and it is quite obvious that the interlocutor 10th
 une 1801, does not find that the lands referred to hold burgage, but
 mply remits to the Lord Ordinary thereon. Therefore, it is un-
 necessary to say more on this point, further than to observe, that
 our Lordships did not seem to think, even as to Netherwood, that
 e finding had gone on this footing when the case was last before
 ou, otherwise your Lordships would not have reversed in the former
 ppeal. The point of terce, however, is not before us.

"The other point relates to a charge against Sir Wilfred Lawson,
 e executor of Mrs. Lowthian, of interest on monies which came
 to her hands. The Court has not charged interest on money which
 ight to have been recovered by him. It is not my purpose to pro-
 ce any reversal as to the interest, and therefore it is more accord-
 g to proceeding, simply to affirm.

"But it is not improper to say a word, for the better understand-
 g the principle of the Court, to prevent it being misunderstood.
 interlocutor read.)

"The charge of five per cent. for interest is made, but a distinc-
 on is taken between principal sums and rents. These are the same
 this country; and there is no difference between them if paid, as
 erest is chargeable on monies received, whether that be principal
 interest, as soon as they are recovered.

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 ———
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“ If the principle be, that the party did not make due account of money received, of £500 of principal on bond, and of £500 of interest or arrears. If he be charged with interest on the principal of money received, why not on both? Yet the Court, more favourable to the appellant than he seems to think himself, allowed interest on principal sums from the day they were received; also on interests and rents received from twelve months after they fell due. There is thus a difference; but no cross appeal has been brought.

“ Lowthian owned property in Scotland and England. He executed deeds in the close of his life in favour of his wife; and a process of reduction was brought by his nephew, to reduce, on various grounds, and, *inter alia*, that he was incapable of understanding the deeds so executed by him, looking to his blindness, and the manner they were executed by the aid of notaries. And also praying that Mrs. Lowthian do account for money and interest. This led to various proceedings below and here; and, finally, the deeds were reduced.

“ I recollect I was counsel in the case, contending very strenuously against their being reduced.

“ It may appear somewhat whimsical that deeds, both in Scotland and England, should have been laid before me as counsel for opinion, which I then prophesied would be difficult to shake—that they should at last be tried before me as judge.

“ The decree was affirmed here, on grounds which have given rise to some debate at your Lordships’ bar. The English property has been overlooked; and nothing carried before an English jury by ejectment. The case, after these points were determined, went back to the Court of Session to take accounts.

“ The interlocutor of 6th February 1796, shows that there is some interest due. This is a very clear interlocutor. (Read). It proceeds on this principle, that the party is to be charged with interest according to their receipts; therefore, it slumps the matter.

“ This course was not pursued. It could not then be well made. Then it was contended, that she could not be charged with interest at all, as the defender had possessed and intromitted in *bona fide*.

“ One strong answer to this is, that the interlocutor gave interest. Though counsel must sometimes imbibe prejudice, it is impossible not to say that this point is concluded and settled; because it is beyond dispute that some of the deeds were reduced for want of moral integrity, and some of the deeds on no other grounds. *Bona fides*, therefore, is no excuse, and interest must be due from some period.

“ Then, in regard to the question of rents, there is no cross appeal; and therefore your Lordships cannot alter in favour of the respondents. In this country, it is quite obvious that a trustee sometimes finds it proper to keep in his hands certain sums, in order to pay back other certain sums due by the estate. In this, the act is innocent. But, in other circumstances, where gross fraud is apparent, he is not only chargeable with five per cent. interest, but also with rests at stated periods.

"I do not recollect in this country a single instance where interest is charged on some sums the moment they are received, and others at twelve months thereafter. It is obvious, that trustees are not to lay out immediately ; but still, in a question of interest, they are liable from the moment they are received.

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"The Court here have adopted a different rule. It seems difficult to say that your Lordships should reverse the interlocutors on this head ; for where five per cent. is given on sums when uplifted, it might be asked, why your Lordships do not charge on other sums according to the same rate and principle. There is no cross appeal on this point.

"The appellant said, that three per cent., which is got from banks, was sufficient. It is dangerous to lay down a rule of this kind, that executors and trustees may be at liberty to speculate, and, notwithstanding, shall only be held liable at three per cent. Nothing, however, which has fallen from me will be understood that this House of opinion that a trustee is to be so charged. It is not proper to say, but I have said so much as to show the special grounds on which your Lordships concur."

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *C. Hope, Wm. Alexander.*

For Respondents, *W. Adam, D. Monypenny:*

NOTE.—Vide App. to Mor. Dict., "Annual Rent," No. 2.

[Mor. p. 15473 et App. Mor. Dict. "Tailzie," No. 5.]

JOHN SYME, W.S., Trustee for the Creditors of	} <i>Appellant ;</i>
Mrs. Ann Ranaldson Dickson of Blairhall,	
[ra. ANN RANALDSON DICKSON of Blairhall,	} <i>Respondents.</i>
and JAMES RANALDSON DICKSON, Esq., her	
Husband, for his interest,	

House of Lords, 25th April 1803.

ENTAIL—CONTRACTION OF DEBT—RESOLUTIVE CLAUSE—DISPONER.
—The entail executed in this case, contained clauses prohibitory, irritant, and resolute, against selling or contracting of debt ; and the question was, whether these clauses respectively were directed against the institute, so as to include him as an heir of entail ? The prohibitory and irritant clauses included him expressly by name, but the resolute clause, which, in this instance, formed a part of the same clause or sentence with the irritant, only made reference to "the person or persons, heirs of tailzie *forcsaid.*" In

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 ———
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“ If the principle be, that the party did not make due account of money received, of £500 of principal on bond, and of £500 of interest or arrears. If he be charged with interest on the principal of money received, why not on both ? Yet the Court, more favourable to the appellant than he seems to think himself, allowed interest on principal sums from the day they were received ; also on interests and rents received from twelve months after they fell due. There is thus a difference ; but no cross appeal has been brought.

“ Lowthian owned property in Scotland and England. He executed deeds in the close of his life in favour of his wife ; and a process of reduction was brought by his nephew, to reduce, on various grounds, and, *inter alia*, that he was incapable of understanding the deeds executed by him, looking to his blindness, and the manner they were executed by the aid of notaries. And also praying that Mr Lowthian do account for money and interest. This led to various proceedings below and here ; and, finally, the deeds were reduced.

“ I recollect I was counsel in the case, contending very strenuously against their being reduced.

“ It may appear somewhat whimsical that deeds, both in Scotland and England, should have been laid before me as counsel for opinion, which I then prophesied would be difficult to shake—that they should at last be tried before me as judge.

“ The decree was affirmed here, on grounds which have given rise to some debate at your Lordships’ bar. The English property has been overlooked ; and nothing carried before an English jury to ejectment. The case, after these points were determined, went back to the Court of Session to take accounts.

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“ This course was not pursued. It could not then be well maintained. Then it was contended, that she could not be charged with interest at all, as the defender had possessed and intromitted in *bona fide*.

“ One strong answer to this is, that the interlocutor gave interest. Though counsel must sometimes imbibe prejudice, it is impossible not to say that this point is concluded and settled ; because it is beyond dispute that some of the deeds were reduced for want of moral integrity, and some of the deeds on no other grounds. *Bona fides* therefore, is no excuse, and interest must be due from some period.

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"I do not recollect in this country a single instance where interest is charged on some sums the moment they are received, and others at twelve months thereafter. It is obvious, that trustees are not to lay out immediately; but still, in a question of interest, they are liable from the moment they are received.

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"The Court here have adopted a different rule. It seems difficult to say that your Lordships should reverse the interlocutors on this head; for where five per cent. is given on sums when uplifted, it might be asked, why your Lordships do not charge on other sums according to the same rate and principle. There is no cross appeal on this point.

"The appellant said, that three per cent., which is got from banks, was sufficient. It is dangerous to lay down a rule of this kind, so that executors and trustees may be at liberty to speculate, and, notwithstanding, shall only be held liable at three per cent. Nothing, I hope, which has fallen from me will be understood that this House is of opinion that a trustee is to be so charged. It is not proper to alter, but I have said so much as to show the special grounds on which your Lordships concur."

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *C. Hope, Wm. Alexander.*

For Respondents, *W. Adam, D. Monypenny.*

NOTE.—Vide App. to Mor. Dict., "Annual Rent," No. 2.

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JOHN SYME, W.S., Trustee for the Creditors of } *Appellant;*
 Mrs. Ann Ranaldson Dickson of Blairhall, }

Mrs. ANN RANALDSON DICKSON of Blairhall, } *Respondents.*
 and JAMES RANALDSON DICKSON, Esq., her }
 Husband, for his interest, }

House of Lords, 25th April 1803.

ENTAIL—CONTRACTION OF DEBT—RESOLUTIVE CLAUSE—DISPONEE.

—The entail executed in this case, contained clauses prohibitory, irritant, and resolute, against selling or contracting of debt; and the question was, whether these clauses respectively were directed against the institute, so as to include him as an heir of entail? The prohibitory and irritant clauses included him expressly by name, but the resolute clause, which, in this instance, formed a part of the same clause or sentence with the irritant, only made reference to "the person or persons, heirs of tailzie *forcaid*." In

1803. an action at the instance of a creditor of the institute against the next heir of tailzie, Held, that as she did not represent the deceased as heir portioner, but succeeded as heir of tailzie, she was not liable in payment of this debt, against which the entail protected.

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1771. Andrew Ranaldson, the father of John Ranaldson, executed an entail of his lands of Blairhall, to and in favour of himself in liferent, and to *John Ranaldson his eldest son*, and the heirs male lawfully to be procreated of his body, in fee; whom failing, to a series of heirs named in the entail. The deed contained proper and apt prohibitory, irritant, and resolutive clauses, directed against selling, alienating, wadsetting, disposing, or contracting debts, and granting bonds or other securities, heritable or moveable.

The prohibitory clause set forth, "That it shall not be lawful to, or in the power of the said *John Ranaldson, my son, or any other of the heirs of tailzie* above mentioned, to sell, alienate, wadset, dispoise, or grant in feu, either redeemably or irredeemably, the lands herein after conveyed, or to contract debts, or grant bonds or other securities of whatever nature, whether heritable or moveable; nor shall any debts the heirs of entail may be owing, &c., anywise affect or burden the lands, or any part thereof, or the heirs of tailzie succeeding therein. Nor shall the heirs of tailzie suffer or permit any decret of certification to pass, whereby any part of the said tailzied estate may be affected or evicted in any manner of way."

The irritant clause declared "That in case *my said son, or any of the heirs of tailzie* appointed to succeed to him in manner before mentioned, shall" contravene the said prohibitions, &c.

The resolutive clause did not allude to the son, but was so connected with the preceding irritant clause (which did specially mention the son) as to form one continued part of the same clause or sentence thus: *But also the person or persons, heirs of tailzie* FORESAID, "so contravening these conditions, shall forfeit," &c.

The entail was recorded; and, on his father's death, John Ranaldson, the son, made up titles under the entail, and possessed until within a year of his death. Having found himself greatly encumbered with debt, he executed a trust disposition, whereby he conveyed all his means and estate, and particularly the lands in the above entail, for the purpose of paying his June 22, 1796. debts, in favour of the appellant and another. He died in a

ear thereafter, without issue, being succeeded by the respondent, Ann Ranaldson, his eldest surviving sister.

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The appellant having further acquired right to sundry debts, due by John Ranaldson, he thereupon raised an action against the respondents for payment of one third part of these debts, as charged, to enter heir portioner to him. In defence, it was pleaded, that the respondent did not represent her brother as an heir portioner, or in any other respect, but as heir of entail; and, therefore, that she was not liable for any of his debts, against which the entail sufficiently protected.

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The Court pronounced this interlocutor: "Upon the report of Lord Eskgrove, and having advised the mutual memorialists for both parties, sustain the defence, assoilzie the defenders, find no expenses due, and decern." A bill of suspension was presented, but its prayer was refused.

Feb. 27, 1799.

Feb. 25, 1801.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—To subject any person who takes in virtue of any interest, to the restrictions and limitations contained in it, all and each of the prohibitory, irritant, and resolute clauses, must clearly and distinctly apply to him, either by name or by legal description. If any one of them does not do so, he is entirely free from such restrictions and limitations. Here John Ranaldson was not an heir tailzie, but fiar and disponee. He took directly in virtue of the entail, and not by service as heir. If, therefore, an entailer intends to impose the restrictions on him, this cannot be effectually done by restricting him in the one clause, without also restricting him in the other. By the entail in question, the resolute clause is alone directed against *heirs of entail*; and although the prohibitory and irritant set out including the son by name, yet even with reference to these clauses, there is a doubt whether he was intended to be included. In the other parts of these clauses, all allusion to him is dropped, and "heirs of tailzie" alone are named. And, as fetters are not to be extended beyond what is clearly expressed; especially against the institute disponee in particular, *in dubio*, it is to be presumed that he is free from the restraints. As fiar and disponee, therefore, he is free, although even from the deed a contrary intention may appear though ineffectually expressed, as was decided in the Duntreath case, *Edmonstone v. Edmonstone*, Vide ante Vol. House of Lords, 15th April 1771. The irritant and resolu-

ii. p. 255.

1803. tive clauses are separate and distinct clauses, having separate functions and effects; and therefore it will not avail the respondents, in order to shield the defects in the resolutive clause, to contend, as they do, that the irritant and resolutive clauses, in this instance; are one and the same clause, and parts only of the same sentence, upon which erroneous ground alone the Court below proceeded.

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Antevol. iv. p.
242.
Bruce v.
Bruce.
Antevol. iv. p.
231.

Pleaded for the Respondents.—The question in the present case is not, as in the case of Edmonstone, whether the institute, or disponsee, in the deed of entail, who was supposed by the entailor to be an heir of entail, shall be bound by clauses which applied only to the heirs of entail; neither is it, as in some late cases, whether the irritant and resolutive clauses are so conceived as to embrace each and all the prohibitory clauses; but it is merely whether the institute, who is included in every one of the prohibitory clauses, and also in the irritant clause, is comprehended in the resolutive clause. It cannot be denied, in this case, that the entailor's intention is clear to impose the fetters on the disponsee. Also that the prohibitory and irritant clauses are pointed expressly against him; but the appellant, in violation of all grammar, would separate the resolutive clause from the irritant clause, to which it stands annexed as part of the same sentence, and concludes that as one clause is defective, the whole must fall. But the slightest inspection will show that the irritant and resolutive clauses form but one sentence. By the words, "my said son," "any of the heirs of tailzie appointed to succeed to him," in the former part of that article, John Ranaldson, besides being aptly and with certainty described as the *entailer's son*, is also plainly and correctly distinguished from the heirs of tailzie; and the words the appellant relies on, i. e. "the person or persons, heirs of tailzie foresaid," made use of in the latter part of the same article or sentence (which the appellant calls the separate and distinct resolutive clause), refer directly to what precedes; "*the person*" clearly applying to the words, "my said son," John Ranaldson.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *Wm. Adam, Chas. Hay, John Clerk.*

For Respondents, *Wm. Alexander, M. Nolan.*

COLONEL ALLAN MACPHERSON of Blairgowrie, and Others, Creditors of the late Sir Samuel Hannay of Mochrum, Bart., and ARCHIBALD SWINTON, W.S., Common Agent in the Ranking of the Creditors,	} <i>Appellants ;</i>	1803.
		MACPHERSON, &c. v. HANNAY.
RAMSAY HANNAY of Middlesex, Esq.,	<i>Respondent.</i>	

House of Lords, 6th May 1803.

REAL SECURITY—STATUTES 1621, c. 18, et 1696, c. 5—**CONJUNCT AND CONFIDENT—DELIVERY OF DEED.**—A party granted a real security to his brother, for a debt owing him, on which no infestment was taken until after the granter's death. His death happened about three years after its date, when it was discovered that he was insolvent, and must have been so at the time of granting the heritable bond. In a ranking and sale of his estate, the creditors objected to this bond, on the ground of its being a fraudulent preference, granted by an insolvent, and to a conjunct and confident person. Circumstances in which these objections repelled, and affirmed in the House of Lords.

Sir Samuel Hannay of Mochrum, Bart., was proprietor of a landed estate in Scotland. He died in 1790 insolvent. The consequence was, that his landed property in Scotland was brought to judicial sale, by a process of ranking and sale; and the appellants were parties creditors, who had produced their grounds of debt in this action. In these processes of ranking they stated objections to an heritable bond for £20,000 granted by the deceased Sir Samuel Hannay to his brother, the respondent, in November 1787, previous to his death, on the ground that it was granted by Sir Samuel to a conjunct and confident person *in fraudem creditorum*, when he was utterly insolvent, and for the purpose of creating an undue preference. It was further stated, that the respondent was in the knowledge of Sir Samuel's circumstances; that he kept the heritable bond latent, and took no infestment until the eleventh day after his death, when it was no longer competent for them to reduce this security, by rendering Sir Samuel notour bankrupt, in terms of the statute 1696, and therefore the appellants insisted that the respondent could not avail himself thereof as a preferable claim, to the prejudice of the creditors, but could only rank *pari passu* with them.

The question therefore was, Whether, where a personal creditor obtains from his debtor an additional *real* security,

1803. which is not published by taking infestment till after the death of the granter, who is then discovered to have been insolvent at the time of granting it, such a security can be set aside, at the suit of other creditors, as fraudulent?
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There was no dispute about the real and onerous nature of the debt, although it was alleged that less was due to the respondent individually than £20,000, although more might be due to him and his other brothers jointly. The respondent contended that, at the time it was granted, he was ignorant of the real state of his brother's affairs. But, in answer, it was contended on the part of the creditors, that he was aware of his insolvency at its date; that this appeared from the whole circumstances. It was to be presumed, from changing the personal debt to a real security—from the letters of Sir Samuel, requesting that the matter be kept "private and confidential, and kept separate and distinct from every other matter;" and the bond was mentioned in his letters, "to secure my brother in the event of my death."

Mar. 11, 1800. The Lord Ordinary pronounced this interlocutor, "The Lord Ordinary having considered these objections, answers thereto for Ramsay Hannay, Esq., writings therewith produced, replies for the creditors and common agent; sustains the objections; finds that the respondent is not entitled to the preference claimed; or, at least, that he can be only ranked upon the heritable bond and infestment *pari passu* with the objectors, the personal adjudging creditors of the common debtor." But, on reclaiming petition, the Lords, of this date, "Alter the interlocutor complained of, repel the objections stated to the interest of the said Ramsay Hannay, in the ranking of Sir Samuel Hannay's creditors, and remit to the Lord Ordinary to proceed accordingly."

Jan. 17, 1801.

Against this last interlocutor of the Court the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The security is reducible at common law, 1. Because it is established by the whole facts and circumstances of the case, and which are not disputed, that Sir Samuel Hannay, at the time of executing the bond in question, was utterly insolvent, and really, though not publicly, a bankrupt. It was therefore a gross fraud in Sir Samuel to attempt to create a preference in favour of his brother over all his other creditors. That he knew, and was well aware of the impropriety of what he was doing, is proved by the injunction of secrecy imposed upon Mr. Loch

letter, directing the heritable bond to be prepared ; Mr. Loch, had he been alive, might have been material on this subject ; for that Mr. Loch believed it to be ret, and an unjustifiable transaction between the brothers, appears plainly from the following excerpts of letters sent by that gentleman to Mr. Johnstone of Carnfalloch, which letters came into the hands of the common agent in consequence of a production made by Mr. Johnstone, in relation to this ranking.

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"I don't know how things stood when you went from this ; as far as I can judge, Sir Samuel has left his matters in a very unhappy situation. Exclusive of the large balance to the brothers, there is at least £50,000 to other people, and I am afraid not £2000 to answer it. Several very unjustifiable transactions appear, which nothing but most direful necessity could have occasioned. You now, I suppose, Ramsay has a security over all the property in Scotland for £20,000 ; but as no infestment was laid upon it till after Sir Samuel's death, I imagine it will not exclude Lady Hannay, though I think it will be good against other creditors."

another letter he says, "Ramsay's security is to be allenged by the creditors at large, but I hope it will stand the test. The weak side of it is this : It now appears, *I am afraid past a doubt, that Sir Samuel was incompetent at the time he granted it,*"—"he granted the security under the strictest injunction of secrecy to his agent who wrote it, and it was delivered to his brother, by whom it was kept with equal secrecy till Sir Samuel's death." 2. It is also equally manifest that the respondent was in the wrong of his brother's circumstances. He had taken the chief charge of remitting the whole money from India ; he could not but know the extent of the sum for which Sir Samuel was debtor to those interested under Colonel Hannay's will. The money was remitted as the proceeds of Colonel Hannay's estate, (a deceased brother), to be divided under his will among his surviving brothers. He also saw the difficulties which Sir Samuel laboured under before the Colonel's death, arising from his connection with a speculative speculation. He saw too, the extravagant and dissipated style in which he was living, and the circumstances attending the whole transaction. 3. The respondent has brought no proof that the bond was delivered to him in the lifetime of Sir Samuel. It was kept latent—made not to

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appear on the record, and this solely in order to deceive creditors, and disappoint them after Sir Samuel's death. He must prove not only onerosity, but that the deed was delivered while the granter was solvent. Here that has not been done. No infestment was taken; and delivery, in the most favourable view, could only be conditional—the condition being to keep it secret until after his death. 4. Even supposing it were proved that the bond was delivered in the lifetime of Sir Samuel, there is evidence arising from the conduct of the parties, and the circumstances of the case, that it must have been subject to the condition of keeping the transaction concealed, and of not taking infestment until Sir Samuel's death. It was as a security, in the event of his death, that Sir Samuel desired it to be made. It was to be kept private. Being intended by the granter, who had urgent reasons for concealment, only as a security in the event of his death, and of a private nature, it follows that it would be delivered only as such to the receiver, who had no less cogent reasons for secrecy. Its publicity would have destroyed Sir Samuel's credit. Secrecy therefore was the foundation of the whole transaction, and its inseparable ingredient during Sir Samuel's lifetime. If the bond was delivered, it must therefore have been only on condition that no infestment should be taken upon it. 5. The deed was also granted to a near relation, and to a conjunct and confident person, which of itself is sufficient to set it aside. Lord Stair says, (B. 1, tit. 9, § 12,) "Generally latent rights among confident persons, are reducible by posterior creditors." And Bankton and Sir George Mackenzie say the same. Even where deeds are not latent, they are not suffered to give a preference to conjunct and confident persons. Several decisions have so laid it down, *Kinloch v. Blair*, 18th Jan. 1678; *Scrymgeour v. Lyon*, 28th Jan. 1696; *Moncrief v. Lockhart*, 13th July 1698, Fountainhall. But as to this challenge, at common law, all creditors, whether prior or posterior, are on an equal footing. 6. The heritable bond was further reducible as falling under the statute 1621, c. 18, at least in so far as regards those creditors whose debts were contracted prior to the granting of the bond in question, as an alienation "to a conjunct and confident person, without true and necessary causes, and without a just price truly paid." It was further reducible under the act 1696, c. 5, as extended by 23 Geo. III. c. 18, as granted by an insolvent, in order to give an undue preference.

Pleaded for the Respondent.—A party obtaining a security upon land is under no positive or legal obligation to publish it, by taking infestment or registering his sasine within a given time. Regard for his own safety alone can induce him to do this, in order to protect himself against posterior incumbrances or securities upon the same subject gaining a preference. But he may act otherwise, if he chooses to incur risks, and allow other creditors to gain such preference. Registers are not intended to give information *generally* of the circumstances of *persons*, but merely of the state of *particular property*, to put those who deal with the proprietor, on the faith of that property, in safety, as they may be affected by nothing which does not appear on the record. The creditors objecting here are mere personal creditors, and creditors adjudgers. It is clear they did not rely on the faith of the record, or of the state of the property. They go upon the personal security of the granter. In all events, they cannot complain against him for having neglected to obtain himself sooner infest, when it is obvious that, by such negligence, he alone could suffer injury, inasmuch as such neglect gave other creditors, and even them, an opportunity of gaining a preference to themselves, and taking off all preference from him. It is therefore exceedingly disingenuous in them to talk of being deceived, or induced to give credit upon the faith of the real estate, when steps were taken by them to affect that estate. Such, it is humbly conceived, is the law; and it makes no difference whether the alienations are voluntary or for valuable considerations. It is alike immaterial to refer to the statutes 1707, c. 18, and 1696, c. 5, for they have no application to the circumstances of this case. Because, in regard to the mentioned act, in order to bring the present case under it was necessary to make out that the security was not granted for a *true, just, and necessary cause*. This has never at a moment been attempted, and could not be attempted, because the security here was granted as an additional real security to one previously a personal creditor. Besides this, the appellants would have to make out that they were creditors of Sir Samuel *at the date* of the security in question, which they have not done, and cannot do. And, in regard to the second named act 1696, it is clear only that it strikes against deeds giving partial preferences to creditors on the condition of the debtor's bankruptcy. But bankruptcy is here the condition of the act, so much so, that it proceeds

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to define what shall be held to be bankruptcy. There must be diligence against him. He must be imprisoned, &c. But nothing of all this took place here. So that neither of the statutes apply. And the circumstances of the origin of the debt by the one brother to the other, is so clearly established, as to preclude all notions of fraud, and all objections on the ground of being conjunct and confident.

After hearing counsel, it was
Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellants, *Wm. Adam, Wm. Alexander.*

For Respondents, *Henry Erskine, John Clerk, David Cathcart.*

NOTE.—Unreported in the Court of Session.

[Fac. Coll. XIII. App. No. 8.]

JAMES MARSHALL, Writer to the Signet ;	} <i>Appellantes</i>
WILLIAM TELFORD, Esq., Cashier of the	
Stirling Banking Co. ; Messrs. CAMPBELL,	
THOMSON, and Co., Bankers in Stirling ;	
and WM. PATERSON, Merchant there, Creditors of JAMES STEIN, late Distiller, &c.	
JAMES STEIN,	<i>Respondent.</i>

House of Lords, 27th May 1803.

BANKRUPT—DISCHARGE—No OBJECTION THAT THE BANKRUPT IS RESIDING IN A FOREIGN COUNTRY—COMPETENCY OF APPEAL.—In this case, the bankrupt, fourteen years after his bankruptcy, and when he was residing in Poland, to which country he had removed after his bankruptcy, presented a petition to the Court, with the usual concurrence of creditors in number and value, for his discharge. Some creditors appeared, and objected that he was not entitled, as a resident of another country, to sue for his discharge here ; and that he had not accounted for the great deficiency in his assets as compared with his debts. The Court of Session repelled these and other objections. In the House of Lords this was affirmed. 2. No objection was stated to the competency of the appeal ; but Lord Eldon thought it would be more expedient that the jurisdiction in bankruptcy were final.

A sequestration was awarded of the estate of James

Stein in February 1788, under the bankrupt act. His debts amounted to £220,974. 9s. His assets, £55,248. 9s. His creditors had this sum divided among them, in five separate dividends, the last of which was paid on 27th December, 1797.

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Fourteen years after the sequestration, the bankrupt, then at the time residing in Poland, applied to the Court, by petition, for his discharge, founding on the bankrupt act, § 43, setting forth that he had undergone the statutory examinations, that he had exhibited inventories of his estates, and conveyed them to his trustee in the usual form; that of the 114 creditors, whose claims were above £20, ninety-five concurred in the application in terms of the act; and showing also, that of the creditors ranked (£199,497) £163,073. 18s. 2½d. concurred.

The act provides, "That the bankrupt shall, in such cases, be discharged, unless the creditors appear and object, and be prepared to show that he has not made a fair surrender of his estate, or refused to grant a disposition to the trustee, as ordered by the Court, or has wilfully not attended the diets of examination, or has been guilty of any collusion, or that his bankruptcy did not arise from innocent misfortunes or losses in business, but from culpable or undue conduct."

In this application, appearance was made for the appellants, creditors, who gave in the following objections to the petition:—1. That, by retiring to a foreign country, without the jurisdiction of the Court, and beyond the reach of his creditors, the application was made incompetent—no person being entitled to avail himself of the laws of a country from which he had absconded to avoid execution. 2. That there was no evidence of the concurrence of four-fifths of the creditors, as the persons subscribing the deed of concurrence do not produce their titles, whether as executors or assignees, or mandatories or agents. 3. That the 43d section of the act, called on the bankrupt to show how the enormous deficiency of his funds arose, so as to show innocent misfortune; and, 4. That the creditors concurring in the application are promised reward for their concurrence.

The Lords pronounced this interlocutor:—"Having re- Nov. 10, 1802.
"sumed consideration of this petition, and advised the same,
"with the preliminary objection formerly lodged on the
"part of James Marshall, (*i.e.* the first objection above
"stated), they repel the objection, and find the absence of

1803. " the petitioner no bar to his obtaining the discharge prayed
 " for. Appoint the new and additional objections this day
 MARSHALL, " given in to be printed and put into the boxes, and allow
 &c. " the petitioner to answer the same *quam primum*."
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The papers that followed were confined to all the objections after the first. To the 2nd objection, the respondent answered, that the act did not require the concurrence of creditors to be proved by legal evidence. If the petition appears in the names of four-fifths, duly authorized, that is enough. 3d. By the terms of the act, the creditors appearing to object to his discharge are not warranted to call upon him, to instruct that his bankruptcy arose from innocent misfortunes. They are only entitled to state certain objections, and "the Court shall judge of these objections, and "allow a proof of them if thought necessary." And the act further does not say, that deceit practised before the bankruptcy, for the purpose of obtaining credit, as alleged, shall bar the discharge; and as to the fourth objection, it was too irrelevant and vague to deserve any notice.

Mar. 2, 1803. " The Lords having resumed consideration of this petition,
 " and advised the same, with the objections, answers, re-
 " plies, duplies, with the minutes this day given in on the
 " part of the Stirling Bank, and other proceedings had in
 " this cause, upon the petitioner's making oath in terms of
 " the statute, they find him entitled to be freed and dis-
 " charged of all debts contracted by him before the date of
 " the first deliverance upon the petition for sequestrating
 " his estate; and for that purpose, grant commission to the
 " Judge Ordinary of Carsun, in Poland, or the Judge Ord-
 " nary of any other place in Poland or Russia, where the
 " petitioner may be, and, in case of his return to Britain
 " before executing this commission, to any of his Majesty's
 " Justices of Peace in England, or any of his Majesty's Jus-
 " tices of Peace or Sheriffs-depute in Scotland, or their Sub-
 " stitutes, to take the said oath at any place within their
 " respective bounds, any lawful day betwixt and the
 " day of next, and assigns that day for report-
 " ing."

Against these interlocutors the present appeal was brought by the creditors objectors.

Pleaded for the Appellants.—The appellants here repeated their objections as pleaded below, viz.—1. That the respondent, residing out of this country, is incompetent, and barred from availing himself of this provision of the bank-

the statute for the purpose of obtaining his discharge. 2. That it was not proved that the persons subscribing the deeds concurred as executors, assignees, or agents, had any title to subscribe. 3. That the respondent has not proved that a great deficiency of his funds arose from innocent mistakes. 4. The appellants offered, and ought to have been permitted to prove, that some of Mr. Stein's creditors had received a compensation for signing the concurrence.

Pleaded for the Respondent.—1. There is no foundation in law for the objection, that the respondent is not entitled to the benefit of his discharge, because he at present resides in a foreign country. 2. The statute has been most studiously avoided in the argument by the appellants. They do not specify any objection embraced within the act, but others which the statute does not include. A great many irrelevant averments are stated, calculated to raise up unfavourable impressions and suspicions, in reference to his dealings before the bankruptcy; but it is clear that they have not proved that he has not made a fair surrender, or has not undergone his examination, or refused to convey the estate to them, while the concurrence of four-fifths utterly refutes all presumptions of unfairness. But, 3d. Where objections, relevant in their nature, are stated, the Court, by the act, is empowered to allow proof of them, from which it humbly appears, that the *onus probandi* of proving such averments is on the objectors. They have not done this in the present case, and therefore their objections must fall; and, The charge of collusion with the concurring creditors is wholly irrelevant and calumnious, and the Court did right in dismissing it *in toto*.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

“ MY LORDS,

“ I am apprehensive it cannot be denied, that it is competent to appeal. But I choose to mark the case, because I cannot but entertain a doubt, which may (if it shall appear to be well founded) require some consideration. Whether this jurisdiction, as to bankruptcy, should not be made final in the Court of Session; because as I will see, if, after a bankrupt has undergone all the judicial inquiry in the Court of Session, which has concluded in an unanimous opinion with the four-fifths of his creditors, who had previously judged had done right, a creditor for £6 or £20 can bring under review of this House the concurrence of the creditors, so followed by the decision of the Court of Session—in such a case,

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1803. where a bankrupt is friendless and penniless, your Lordships must see at once that he had better submit. Indeed, he must submit to the attempt to deprive him of his discharge, whether there be any sound reason for it or not, instead of coming to the bar to support his claim to that discharge, which four-fifths of his creditors, and the unanimous opinion of the Court of Session, have declared he is well entitled to."

It was ordered and adjudged that the interlocutors complained of be affirmed, with £150 costs.

For Appellants, *C. Hope, Wm. Alexander.*

For Respondent, *Wm. Adam, Henry Erskine, John Clerk.*

[M. App. Insurance, No. 4.]

MESSRS. GEORGE LOTHIAN, ANDREW PATON,
JOHN TELFER, ANDREW MACMILLAN, JAMES
MILLER, HUGH LOVE, and Others, Merchants in Glasgow, all Underwriters, } *Appellants ;*

MESSRS. HENDERSON, RIDDLE, & Co., Merchants in Glasgow, Agents and Attorneys of Messrs. Henderson, Ferguson, and Gibson, Merchants and Partners in the State of Virginia, Citizens of New York, America, } *Respondents.*

House of Lords, 8th June, 11th and 13th July 1803.

INSURANCE—WARRANTY—FOREIGN SENTENCE OF CONDEMNATION—COMITAS—RELATIVE AGREEMENT.—The appellants, as underwriters in Glasgow, insured the respondents' ship as an *American vessel*, belonging to them, as American citizens, which was then in America, together with her cargo, on voyage from America to Rotterdam. The war with France was then pending. She sailed from America to Rotterdam, with all the necessary documents on board which American vessels were in use to carry in terms of existing treaties between America and France, as well as the law of nations applicable to neutrals. But it not being known at Glasgow, when the insurance was effected, or in America when the ship sailed, that a Muster Roll, or Role d'Equipage, which, by a recent ordinance or Arrêt of the French Government, was also necessary to be carried by such vessels, she was captured in the course of the voyage, and condemned in the French prize courts as enemies' property, in consequence of not having this document. In an action for the sum in the policy, three questions were argued, 1st. Whether the policy itself contained a warranty

of American documented, as well as American property. 2d. 1803.
 Whether the sentence of condemnation of a Foreign Prize court
 must be conclusive in negating a warranty of neutrality ; and, 3. LOTHIAN, &c.
 How far a relative agreement, entered into by the parties, explanatory of the warranty in the policy, qualified that warranty. Held
 in the Court of Session the insurers liable. Affirmed in the House
 of Lords, after taking the opinion of the whole judges of England
 (who were divided) on the questions submitted. Lord Eldon, after
 consulting these judges, held that this case must be decided on its
 own circumstances, and that the relative agreement qualified the
 warranty in the policy, and made the insurers liable in all events,
 on proving that the ship was American property only.

The appellants insured the respondents' ship, the Catherine,
 an American vessel, belonging to the respondents, as American
 citizens, and then in America, together with her cargo of tobacco,
 by two policies for £4900, in the following terms: "From 1797.
 a port or ports in Potowmack and Patuxent Rivers to Hel-
 voetsluys, and from thence to Rotterdam, or a port to the
 northward, upon any kind of goods and merchandizes, and
 also upon the body, tackle, apparel, ordnance, munitions,
 artillery, boat, and other furniture, of and in the good
 ship or vessel called the Catherine, an American vessel,
 whereof is master, under God, for this present voyage, Sa-
 muel Casnew, beginning the adventure upon the said
 goods and merchandizes, from the loading thereof aboard
 the said ship Catherine, as aforesaid, upon the said ship,
 &c., and so shall continue and endure during her abode
 there upon the said ship, &c., and further, until the said
 ship, with all her ordnance, tackle, apparel, &c., and goods,
 and merchandizes whatsoever, shall be arrived at Rotter-
 dam, or at a port to the northward, upon the said ship,
 &c. until she have moored at anchor twenty-four hours in
 good safety ; and upon the goods and merchandize until
 the same be there discharged and safely landed." Then fol-
 lowed this clause, " Touching the adventures and perils, which
 we, the assurers, are contented to bear and do take upon
 us in this voyage, they are of the seas, men of war, fire,
 enemies, pirates, rovers, thieves, jettisons, letters of mart
 and countermart, surprisals, takings at sea, arrests, re-
 straints, and detainments of all kinds, princes and people
 of what nation, condition, or quality soever, barratry of
 the master and mariners, and all perils, losses, misfortunes
 that shall count to the hurt, detriment or damage of the
 said goods and merchandize, and ship, &c., or any part

1803. " thereof. And in case of loss or misfortune, it shall be lay
 ————— " ful to the assureds, their factors, servants, and assign-
 LOTHIAN, &c. " to sue, labour, and travel for, in, and about the defence
 v. " safeguard, and recovery of the said goods and merchand-
 HENDERSON, " dize, and ship, &c., or any part thereof, without prejudic-
 &c. " to this insurance, to the charges whereof we, the assureds
 " will contribute each one according to the rate and quantiti-
 " of his sum herein assured. And it is agreed by us, the insur-
 " surers, that this writing or policy shall be of as much force
 " as the surest writing or policy of insurance heretofore was
 " in Lombard Street, or in the Royal Exchange. And as
 " we, the assureds, are contented to, and do hereby promise
 " and bind ourselves each one, for his own part, our heir
 " and executors, to the assured, for the true performance of
 " the premises."

Some doubts having arisen as to the warranty in the policies; the underwriters subscribed this relative agreement with reference to them. " Whereas doubts have arisen how far, by the insurances underwrote, there is a warranty of property, and what is to be understood by such warranty, It is hereby declared, that in case of capture or seizure, Messrs. Henderson, Riddle and Company, before they claim for a loss, must produce proof of the ship being American bottom, and by bills of lading show, that the tobacco shall have been shipped on account and risk of Messrs. Henderson, Ferguson, and Gibson, upon which we shall settle by granting our bills at four months' date for the amount, deducting the stipulated premium, in the full dependance that the insured will use their best endeavours to recover the property as for account of the shippers."

The Catherine left Nottingham, in Virginia, on 1st April, but, on 17th May, while in the course of her voyage, she was captured by a French privateer, and was condemned, notwithstanding opposition and claim made for the ship and cargo, as a lawful prize, by decret of the French courts, which was produced. The ground on which this condemnation proceeded was, that she had not on board a *Rôle d'Equipage*, as required by an Arrêt of the Executive Directory of the French Government.

This Arrêt was not published, and could not be known in America nor in Glasgow when the insurance was effected.

The captain of the vessel appealed against this condemnation to the superior court, the civil tribunal of the de-

partment of the Lower Loire, sitting at Nantes; but it pronounced a decree affirming this sentence of condemnation. 1803.

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The insured then made their claim against the insurers as for a total loss on the policies, adducing the decree of condemnation; and some refusing to pay, they were obliged to raise the present action before the Judge Admiral, who assoilzied the defenders, on the ground, "that the condemnation of the ship in question was founded upon the said ship not being furnished with proper vouchers to prove the neutrality of said ship." Mar. 2, 1798.

Of this decree a reduction was brought.

The Lord Ordinary pronounced this interlocutor: "This May 28, 1799. demand the underwriters have resisted, on grounds which appear to the Lord Ordinary untenable. It has been admitted in this case, that this ship had, when captured, every document on board to prove that she was American, and the cargo American property, which American ships usually had, and every document to ascertain that fact, which had been required by France on all former occasions, therefore any decision of the admiralty subaltern court of Nantes is not entitled to that regard and comitas which in general regulates the law of nations. If the decision of the court of Nantes has proceeded on some late regulation authorised by the French Directory, directing certain forms and observances, for ascertaining that all ships, claiming the privilege allowed to American ships, such as having on board certain muster rolls, or what they now call a *Rôle d'Equipage*, should be necessary to save their condemnation: it is sufficient answer to this ground of condemnation, that such a regulation was not published, and could not be known in America, nor in Glasgow, when the insurance in question was made; and therefore, it does not appear that the sentence of condemnation at Nantes has proceeded on any violation of the treaty between France and America, but wholly on capricious particular ordinances, which were not known to other countries, and ought not to be regarded; therefore, upon the whole, sustains the reasons of reduction."

On representation the Lord Ordinary adhered. July 2, 1799.

On reclaiming petition the Court, who pronounced an interlocutor, ordering the decrees or *Arrêts* of the French court of Admiralty to be printed and produced, and thereafter, of this date, pronounced this interlocutor: "Having June 27, and July 4, 1800.

1863. " particularly attended to the policy of insurance, and the
 " writing relative thereto, find that the insured, in this case,
 LOTHIAN, &c. " are entitled to recover from the insurers on account of the
 v. " loss sustained, by the seizure of the ship and cargo in
 HENDERSON, " question, and that the sentence of condemnation in
 &c. " France is no bar to such recovery; find that there was no
 " contravention of warranty on the part of the insured, and
 " that they produced to the insurers all the proof which
 " they were obliged, by the terms of the said policy and re-
 " lative writing to produce, and therefore sustain the rea-
 " sons of reduction of the decree pronounced by the Court
 " of Admiralty in Scotland; decern and declare in terms of
 " the libel; find the pursuers entitled to expenses."*

* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said.—“ The effect of a decree of Court of Admiralty in France, condemning an American vessel as prize, in a question of insurance, is the important point to be decided. There is no warranty of the ship's being American property, attended with all the privileges of neutrality as such. The policy and relative letter contain merely a description; and the insured undertakes only to produce evidence that she is an American bottom if required. They purposely avoid any other sort of warranty or undertaking, than they might not be involved in such a question as the present. The risk of capture by the French, on the pretence of being enemies' property, or not American property, so far from being undertaken by the insured, is one of the risks insured against.

“ True, it was necessary, independently of any special warranty, that the master should be furnished with the necessary papers and dispatches, and not to sail as pirates or smugglers. But so he was provided according to the then standing treaty. The capture therefore was a robbery, and the condemnation of the vessel as prize a gross breach of existing treaty and of the law of nations, which no court can give countenance to, without participating in the crime.

“ I therefore go on two grounds; 1st. No warranty. 2d. Suppose there was a warranty, yet the French decree being against the law of nations, and of treaties, upon the face of it, is not to be regarded. We have the authority of the French themselves, that the treaty 1798 is the rule.”

LORD MEADOWBANK.—“ In certain cases the judgment of a foreign Court is conclusive, *e. g.* where it is made a question only, Whether the foreign decree did right or wrong, and where the jurisdiction is not disputed. In the present case, the decree is conclusive as to the transfer of the property. Suppose, after condemnation, it had been purchased by a Dane, and brought into Leith. Could the original

Against these interlocutors the present appeal was brought to the House of Lords. 1803.

Pleaded for the Appellants.—By the unanimous consent of all civilized nations, and of all the writers and authorities on public law, the decrees of the Courts of Admiralty, pro-
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owners have claimed it? I think not. But here it is not the same question, but a question incidental, and between different parties. The interest of an American cannot be affected by such judgment. An American is not obliged to acquiesce, and may issue reprisals. The confiscation is final; but there remains a right of reprisal competent, *ergo* they do not hold the condemnation legal. Can we, therefore, by this question of insurance, hold it legal, when the Americans have actually gone to war upon that very ground? The French law seized this, and other American vessels, as an act of state policy, and not truly as a legal capture, justifiable by the law of nations. Can we therefore hold the decree of condemnation conclusive in such circumstances? I think not.

“ Besides, here there was no breach of warranty incurred: for they find it to be American property, and only condemned because she had not the additional paper on board, which, at the time the *Arrêt* was passed, it could not be known to the parties was necessary. I therefore think the insurers liable.”

LORD HERMAND.—“ I am of the same opinion. A warranty is of strict interpretation. The insured undertook nothing but what is contained in the letter. There is nothing said about peace or war; and even if the condemnation were legal, it would not avail the insurers. It was an insurance against capture, right or wrong. It was enough to be provided with such papers, as by the law of nations and existing treaties, were necessary and required at the time of sailing.”

LORD BALMUTO.—“ There was a high premium, *ergo* a great risk in view, although no war.”

LORD JUSTICE CLERK.—“ I think them bound to a certain extent by the foreign decree, but not in all the circumstances. It is clear, *ex facie*, that the decree is inconsistent with the law upon which it professes to decide. The fact of their being American property is material in the policy, because it might increase or lessen the risk. Accordingly it is settled, and that is enough,—enough to prove any how that it was American property.”

LORD METHVEN.—“ See clause by which the insured are entitled to recover, even before condemnation. I think the insurers are liable.”

LORD BANNATYNE.—“ I am of the same opinion.”

Vide President Campbell's Session Papers.

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ceeding according to the law of nations as to all matters decided by such decrees, cannot be opened or brought into question in the courts of another country. 2. Here, in the present case, by the policies of insurance, the *Catherine* is stated to be an American ship, and the cargo to be the property of citizens of the United States of America; and the decree of the French court, finding that the *whole* is to be deemed the property of the enemies of the Republic, is a conclusion which completely negatives the neutrality specified in the policies. In the face of this decree, this question cannot be again raised in another court, because the decree of the foreign court must be respected, and be held conclusive on the subject. 3. The *Role d'Equipage*, or muster roll, the want of which, in the present case, was given by the foreign court as one of the reasons for arriving at the conclusion of enemies' property, was specially required in the treaty 1778 between France and America, to all ships of both countries, in navigating in time of war, its form being laid down in the model of the passport annexed to the treaty, and such *Role d'Equipage*, or muster roll, is alluded to in the 9th article of the consular convention between France and America in 1788. That although such muster roll may have fallen into disuse, the French ordinance requiring it to be carried by all American ships, was not an ordinance contrary to the law of nations, and a detention of the ship, and carrying her into France, for the want of such roll, was a deviation that released the underwriter. 4. Nor can the agreement relative to, or explanatory of the policies, in the present case, make any alteration of the rights of parties; as such an agreement cannot release the assured from the obligation of being furnished with all the requisite papers in sailing the ship, to protect her as an American ship; and to prove that she and her cargo were the property of citizens of the United States; and such agreement is also completely negated by the condemnation of the ship and cargo as enemies' property.

Pleaded for the Respondents.—The assured did not, by the terms of the policy, warrant the neutrality of the vessel, or any thing else. The ship was stated to be an *American*, agreeably to the fact, but that was merely descriptive; and it is well known that something farther is constantly inserted in policies, when the assured are understood to undertake that the vessel is entitled to the benefit of neutrality. The terms used in such case are, *warranted neutral*, or

warranted neutral property. Here nothing of that kind was done; and the respondents apprehend, that describing the ship as an American, cannot possibly admit of such a construction. Supposing the description of the vessel as being an American amounted to a warranty, not only that the ship was in truth an American bottom, but that she sailed with all the requisite and usual documents to prove her neutrality in case of seizure, they have complied with the warranty, the proofs being incontestible that both ship and cargo did belong to citizens of the United States. The vessel was stated to be American, because, as such, she was not free from danger from the French ships. A premium for a greater risk was charged (in truth a war premium) and paid. And the assurers undertook the risk of *takings at sea, arrests and detainments of kings, princes, and people of every nation*; and it is *jus tertii* in them now to argue, after the vessel is taken a lawful prize, that the assured must be held by implication to have warranted that the vessel should not be arrested, detained, or condemned by the French, under any pretence. The respondents apprehend, that, describing the ship as an American, cannot possibly admit of such a construction. Further, even supposing, over and above such warranty, there had been an implied warranty that she was to sail with the usual documents which an American vessel ought to have had, still it was in the power of the parties, by agreement, to pass from the warranty, or to explain and limit it. This was effectually done by the instrument signed on 20th April 1797, which declared, that on seizure of the vessel they should pay the loss, on proof that the ship was an American bottom.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

“ My Lords,

“ This case came to a hearing before your Lordships in the last Session of Parliament. It was then argued on both sides, and several of your Lordships, thinking it involved questions of great importance to the public, required the aid of the learned judges, before pronouncing a decision upon it. It is for the purpose of following out this, your Lordships’ suggestion, that I now address you.

“ The question arises on a policy of insurance, underwritten on the Catherine, an American vessel. (Here his Lordship read the date, parties’ names, and import of the policy.) Nothing is stated in this policy as to the ownership of the cargo; but it was stated that it had been held, in repeated instances, decided by the Court, that the

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1803. words used with regard to the ship, amounted to a warranty that ~~she~~
 was an American vessel, and as such, bound to be documented as
 LOTHIAN, &c. American vessels ought to be documented.

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 HENDERSON, “ At the period when the insurance was effected, nobody could
 &c. form an opinion what species of prize law would be administered in
 France. The parties, sensible of this difficulty, seem to have con-
 sidered it advisable that the policy should be farther explained, and
 construed by a separate agreement. Accordingly, on the 20th April
 1797, they entered into an agreement relative to the policy. (Agree-
 ment read.) The parties appear to have had two grounds of doubt,
 1st. Whether the policy implied any warranty at all?—and, 2dly.
 Whether, if there was warranty, how it was to be understood? This
 agreement is varied in some degree from the policy. In the policy,
 the Catherine is stated to be an *American vessel*; in the agreement,
 the insured were taken bound to produce proof that the ship was an
American bottom.

“ Under such insurance, the Catherine sailed from an American
 port. I must here notice, that according to the forms of the Scotch
 Courts, when an averment is made by one party, and not denied
 by the other, such averment is held to be admitted. In this form.
 it was admitted in the action between the present parties, ‘ that this
 ‘ ship had, when captured, every document on board to prove that
 ‘ she was American, and the cargo American property, which Ameri-
 ‘ can ships usually had, and every document to ascertain that fact,
 ‘ which had been required by France on all former occasions, and
 ‘ which were known in America to have been required by France at
 ‘ the time.’ About this period, France made certain ordinances, di-
 recting courts of prize in that country to treat all ships as enemies,
 which had not on board certain papers mentioned in these ordina-
 ces.

“ In the course of her voyage, the Catherine was captured, and car-
 ried into France, where she was condemned by the tribunals of th ~~at~~
 country, on certain grounds specified in the sentence of condemna-
 tion. One part of the dispute in the present cause is, Whether the
 ship was condemned as *enemies’ property*; or *treated as enemies*
 property, though *quoad* the ownership, they remained American?

“ It appears, that upon the capture, the assured made applicati~~on~~
 to the underwriters to indemnify them for the loss, offering to prove
 the ship to be an American; and they produced the bills of lading
 to show that the tobacco was shipped on account of Messrs. Hender-
 son, Ferguson, and Gibson. They therefore called upon the under-
 writers to settle, by granting bills at four months’ date, in terms, as
 they stated, of the relative agreement.

“ The underwriters (as underwriters in such cases usually do,) 
 looked about them, to see if they were bound to pay or not. In the
 meantime, the sentence of condemnation took place; and the under-
 writers taking hold of it, declined to settle as required. They stated

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at the policy having described the Catherine as an American vessel, implied a warranty, not only that she was American property, and American documented, but also so documented as that she could be free from capture and condemnation:—but, as a judgment condemnatory had been pronounced, they insisted that this was also conclusive against the insured.

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“On the other side it was answered, 1st. That even though, in this case, the policy might imply a warranty that the ship should be documented in every particular as an American should document his ship, still the sentence was not conclusive, even though it proceeded on the ground of enemies’ property. 2d. They contended that, in point of fact, it did not proceed upon that ground. And, 3d. That if had, the separate agreement clothed the insured with a right to call on the insurers to settle, upon showing that the property was American. It was further urged, that the true meaning of the agreement was, that the underwriters should immediately have granted their bills at four months’ date, and if these had been paid before the sentence of condemnation, the money never could have been recovered back on the ground of that sentence.

“The arguments maintained on both sides seem to have been submitted with a degree of learning and assiduity that I must notice as highly honourable. They were taken up with no less attention by the bench, who entered into a painful consideration of the cases decided in Scotland,—of the law of nations, as bearing upon this point,—and afterwards of the cases which had been decided in this country.

“The interlocutors pronounced were, (the same read.) From the appeal was brought here. I must notice, that if the judgment can be supported upon all, or any of the points contained in these interlocutors, the usual course is to affirm them. If none of these points are well founded, the interlocutors must then be reversed.

“This case contains questions of very great importance to the public.

One of these is, Whether the sentence of the courts in France, which held the property to be enemies’ property, should be conclusive or not, not only between captors and proprietors, but between insurers and insured. In one view of the case, the learned judges, before whom I suggest the case should go, may have to determine this question; in another, it will not be before them. Upon this Mr. Attorney-General stated a most important fact, namely, that judgments have been given in this way for forty years past. In the first of the cases so decided, the ground of decision put is, that the underwriters might have gone into the Court of Admiralty, and assisted themselves as parties. It appears, however, that this could not have been done in the Courts of Admiralty in this country.

“A noble and learned Lord, now absent, entertained great doubts of the soundness of that ground of decision. I also, if such a matter had been agitated forty years ago, must have entertained doubts upon the subject. But, if I could have presumed to think that the

1803. judgment proceeded originally on wrong grounds, yet if such practice had followed upon it as has taken place, I should deem it most dangerous to disturb matters so long at rest.

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"I must express regret at seeing so many of the decisions in question pronounced upon special cases, and that such a form of proceeding in matters of insurance is so much in fashion. Yet I must say, that such a course of decisions, where one judgment has exactly followed another, though not brought under the appellate jurisdiction of this House, must be held to be conclusive. I therefore conceive, that your Lordships would scarcely say, in contradiction to the judgments of this Court, that the foreign courts do not determine, what they expressly state on the face of the sentences that they do determine.

"The next question is, on what points must such sentences be held to be conclusive, and, Whether they have proceeded on the ground of enemies' property, or on other grounds? Are such other grounds to be founded on the law of nations? And can the courts here interfere in a question, as to whether they be founded on the law of nations or not? This is more open than the former question, as to length of time, and the number of decisions pronounced.

"This point, in the present case, the Judges may also have to consider, and whether every condemnation or prize, be not an adjudication of enemies' property. In the case of neutrals carrying the colonial produce of an enemy, resisting search, and a great variety of others that might be mentioned, the property might still remain neutral, and the condemnation for behaving as enemies, *pro hac vice*, be perfectly consonant to the law of nations.

"Another doubt had arisen with regard to these decisions, whether, when bad reasons are given, in the sentences of condemnation pronounced by the foreign courts, the courts of this country can enter into a consideration of these sentences. Upon this we have heard, that a sort of distinction has been taken, and that the courts will sometimes enter into them, if they think them not according to the law of nations. In some cases it has been held, that if, in direct terms, the sentence adjudges the property to be enemies' property, the courts will not enter into their sentences, though they appear to be founded upon bad grounds. In other cases, the Court will enter into such sentences, if the judgment has only held the property to be *good prize*, and had founded such judgment upon unjust reasons.

"Several difficulties suggest themselves on this subject. 1. What can be meant by a judgment condemning as *good prize*, if it does not also mean enemies' property? 2. What would be the effect of sentences like these, in questions of trover, or where the direct property is called in question? 3. How far is it consistent with the convenience of nations, if I may so speak, that the municipal courts should examine the sentences of this nature? These points are of very great importance, and at present I only notice them thus briefly.

" We have further to attend to the sentence of condemnation, in the present case, in this light. Has the ship been condemned as enemies' property, or has it only been treated as such, and held as prize, upon other grounds ?

" But whatever might have been the determination upon this point, if the case had stood upon the policy alone, the next question is, What is the measure of justice that is due to the parties upon this separate agreement ? This may narrow your Lordships' judgment greatly ; for however consonant it might be to public convenience, to decide all the grounds of this case, yet your Lordships act wisely in going no farther than is necessary to settle the several interests of the parties in every cause. This, it has been found, best serves the due administration of justice.

" I must now, therefore, call your particular attention to the explanatory agreement. One party says, that it puts all the other topics out of the case :—this the other party denies. It is a question with me, if the assured did not see the chance of disputes like the present, and say that they would not be involved in them. They said, ' we will settle with you on certain grounds, in case of capture ; but as to the question of property, whether yours or ours, in that event, we will not meddle with it.' We call upon you to decide two doubts ; 1. Whether there be any warranty whatever in the policy ? and, 2. As to the nature of such warranty ? Such, I think, may have been the reason of entering into this separate agreement.

" It has been already noticed, that the policy describes the ship to be an American vessel, and that this, it has been decided, requires the ship to be American documented. It is now too late to inquire whether such decision was well or ill founded, though I might have well entertained doubts upon the subject.

" It was argued, that if the underwriters meant to insist that the ship should be American documented, they should have not varied this in the agreement from the words of the policy ; that when the parties agreed to settle on certain terms, in case of capture, they surely must have meant that such settlement might be before condemnation. It was also to be held, that, if a condemnation was to have varied this settlement, they would have said so. Upon the whole, it was insisted, that the proof of an American bottom might have meant something less than American documented, and that if the bills had been given, and payment made on them, that the underwriters could not have demanded back the money after a sentence of condemnation.

" Put the case, that the bills had been granted, payable in four months, that the condemnation had taken place two months before they fell due. If they had gone into the hands of third parties, no doubt the amount of them might have been recovered ; but if they remained in the granters' hands, it comes to be a question, whether the granters could recover in an action brought upon these

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— bills. The Attorney-General contends, that the condemnation negatives the consideration for which the bills were granted. But if
 , &c. the true meaning of the agreement was, that the proofs that could
 .ASON. be given in four months, were the proofs that should be taken, it
 C. appears that the amount of the bills must have been recovered.

"It appears to me proper to consider the case first in this view, which will let us into the question made by Mr. Attorney-General, if this be a legal agreement or not.

"These points appear to me to embrace the whole case. If the judges shall think that this explanatory agreement shuts out the large views of the case, they will have to give their opinion upon it alone. If not, they will have to consider the other important points of the case.

"I shall first, therefore, move that a question be put to the judges upon this point. I am sorry that I have been obliged to state this at some length; but the reason has been, that, after some consideration, I found that I could not curtail it with propriety."

The following question was put to the judges:—

Whether, in this case, taking it to be admitted that the ship *Catherine*, when captured, had every document on board to prove that she was an American, and the cargo to be American property, which American ships usually had, and which had been required by France on all former occasions to ascertain such facts, and which, at the time of her sailing from America, were known in America to have been required by France for that purpose, if, upon proof having been made that the ship *Catherine* was American bottom, as belonging to American owners, and upon it having been shown by bills of lading that the tobacco insured had been shipped on account and risque of Messrs. Henderson, Ferguson, and Gibson, bills payable at four months' date, had, after the capture of the ship *Catherine*, been given to the assured by the underwriters, for the amount of their subscriptions upon the policy of the 8th March 1797, deducting the stipulated premium, and such bills had remained in the hands of assured until after the sentence of condemnation of the vessel, the assured could have recovered against the underwriters in actions brought upon such bills, after and withstanding such sentence of condemnation, regard had to the legal meaning and effect of the said policy sentence. And of the agreement of the 20th April 1

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BARON GRAHAM.—(His Lordship commenced by stating the circumstances of the case, the policy of insurance, and relative agreements, and read the interlocutors of Court, and then proceeded.)

“From these interlocutors an appeal has been brought to your Lordships, and thereupon a question has been put for the opinion of the judges.—(Reads the question.)—By resolving this question into several propositions, it appears to be exceedingly simple. The principal question for our consideration is, Whether the insured could have recovered upon the bills that might have been granted, in terms of the relative agreement, after such a judgment of condemnation as was pronounced in the present case?”

“If the underwriters had granted these bills absolutely, and as a final settlement, no doubt they bound themselves to make payment of them. There was no *express* warranty either of ship or cargo. The agreement seems to have been made in a spirit of candour. The underwriters require to have it shown that the ship was an American bottom, and, by bills of lading, that the cargo was American property. By the agreement, they must have meant to concede something; but I am at a loss to know what that was, except as to the mode of proof.

“This was a period when it was well known that many arbitrary and wanton acts of power were committed in the French Courts. There is little doubt but the underwriters were aware of this, and meant to relieve the assured of its consequences. They said, we only require certain acts to be done on your part, and take upon us the risk of unlawful force and violence.

“They do not say, that in case of condemnation, the bills granted should be delivered back; they stipulate merely, that the insured should come forward, in their neutral character, to use their best endeavours to recover the property as for themselves, but in trust for the underwriters. This must mean after condemnation. It could mean nothing before judgment to that purpose, as the insured otherwise, and except in case of condemnation, would have got back the ship.

“But it was said, that the underwriters were to be let into a contrary proof. It must have been the meaning of the parties, however, that a condemnation negating the bills of lading was not to be received. I therefore think that the insured have done everything required on their part by the underwriters.

“I am therefore relieved from giving any opinion upon these disgraceful sentences. The sentence, in the present case, says, almost in plain terms, ‘The ship and goods are no doubt proved to us to be American property; but as the captain had not on board a certain paper, which he was bound by no treaty or otherwise to have on board, therefore we condemn the ship and cargo.’

“As to the argument urged, that if the interlocutors were affirm-

1803. ed, neutrals would be prevented from exerting themselves, that
 not a ground on which to form a legal objection to a contract in
 court of law.
 LOTHIAN, &c. r.
 HENDERSON, "I therefore hold the opinion that the insured might have been
 &c. covered on the bills."

JUSTICE CHAMBER.—"In offering my opinion, I shall first consider the legal meaning of the explanatory agreement. If it were meant by it that the underwriters should be liable in all event then, no doubt, they are not liberated by the decree of condemnation."

"At the time when this agreement was made, it is clear that the assured had right, on the description in the policy, to all the advantages of a warranty, as has been long since determined, and uniformly acted on since, in this country. As to this the parties, in the explanatory agreement, express their *doubts*, 1. If there was such a warranty? and, 2. What was to be understood by such a warranty? This shows that they had little experience in such matters, and that the agreement may receive an interpretation different from what it must do, if they had been fully conversant upon the subject. (Here he read the agreement)."

"It is contended, that by this agreement, the underwriters are bound to take the proofs here stated, as conclusive even in the case of condemnation. I cannot assent to this. Proof means legal proof. If the underwriters were satisfied, they might pay. But if, in case of dispute, the parties went into a court of law, were the underwriters to be precluded from giving evidence of a sentence, condemning as enemies' property, as of a fraud, or other such thing? I should hold it necessary to have very clear words to such an agreement."

"I see no difference upon this point, and view it as if no agreement had been made at all. The Court had cognizance of the ship being American, and conclusive evidence as to this has arrived in due time to regulate this decree."

"It seems impossible to say, that the obligation to grant bills a four months' date can alter this. If there had been no such obligation, the money was instantly due, and, as such, might have been sued for."

"As to the assured being bound to use their best endeavours to recover the property, I see nothing in this on which to alter my opinion. In many cases, the endeavours of the assured might be of use to the underwriters. As in the case of capture and recapture or of capture and acquittal, and the like, the underwriters being liable, under the policy, to all the consequences of the detention. On consideration of the whole agreement, and the want of information of the parties apparent on the face of it, I think the effect of decree of condemnation on the warranty did not enter into the contemplation. If it had, and if it had been their intention that it

underwriters should pay, notwithstanding the decree of any court, 1803.
nothing would have been more easy than to have been explicit upon
that point.

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"The most interesting question upon the case is, with regard to the effect of a sentence of condemnation in a foreign prize court. Upon this I shall be very short. It has been decided in a multitude of cases, that such judgments shall be held to be conclusive as to what appears on the face of them. This doctrine commenced with the case of Cornelius and Hughes, reported by Shower, by Holts, Shower, 2d and other great names. It is true, this was a case of trover, where the direct property only was in question; but it has been uniformly applied to every case of insurance since the question was first agitated as to such matters.—(Here his Lordship quoted a great many cases, from that of Bernardi and Motteaux, down to what he termed 'that most admirable judgment,' pronounced by the present Master of the Rolls, in the case of Kindersley and Chafe, at the Cockpit, which he read. He also read the words of the judgment of the French courts in this case, to show that they had distinctly come to the conclusion that the ship and cargo were enemies' property). Doug. 575. Park Insur. p. 353.

"Another part of the question put still remains to be considered, namely, if, in the circumstances of this case, payment could have been resisted, if the notes or bills, payable at four months' date, had been granted in terms of the agreement? If these bills had, *bona fide*, got into other hands, the parties could not have resisted payment. But if they had remained in the hands of the assured, my humble opinion is, that the underwriters might have defended themselves.

"If these sentences be conclusive, they must be so to all intents and purposes whatever. They overturn every fact which the assured were to make out. The bills therefore would have been given on a mistake in point of fact, and therefore would have failed in the consideration. If so, as in other similar cases of a failure of the consideration, the holders would have been barred from suing on the bills."

JUSTICE LE BLANC.—"The questions for our consideration in this case are, the legal consequences; 1. Of the policy of insurance. 2. Of the foreign sentences; and, 3. Of the relative agreement. If we had been agreed as to the last of these, it would have been unnecessary to have entered into the two first points. Justice Le Blanc's Opinion.

"It was scarcely denied at the bar, that the description in the policy was an express warranty. It is an established proposition, that every positive averment in an instrument of this nature amounts to a warranty or condition on which the policy depends. (His Lordship cited sundry cases that had found to this effect.)

"The next question is, as to the effect of the sentences of the Admiralty courts of France. The uniform language of the courts of this country has been, that such sentences are conclusive as to what they meant to decide. Let us see what was decided

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 LOTBIAN, &c.
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in the present case." (Here his Lordship read great part of the judgment of the Prize Court and Court of Appeal.) "Is it not clear that these courts condemned the ship and cargo as enemies' property, or as considered to be such by them, and therefore liable to condemnation? If so, the sentence falsifies the warranty, and no case can be produced where our courts have decided otherwise. If it appear doubtful what the foreign court may have decided, as if judgment has been given on other grounds than that of enemies' property, then the courts of this country have sometimes opened up such sentences. (Here his Lordship cited several of this class of cases.)

"But the language in these uniformly was, we will not go into the sentence further than to see what it really contains. The cases decided upon these grounds have been numberless, and the property immense. Many of them might have been brought before your Lordships by writs of error, if any doubt had been entertained as to them.

"The only other question is, as to the effect of the explanatory or relative agreement. Independently of it, the insured were bound to prove that the ship was an American vessel. Does this averment clearly show that the underwriters meant to narrow the warranty? I cannot think it does. It recites that doubts had arisen, &c. It says, the assured were to produce proof of the ship's being an American bottom, without specifying the particular species of proof. If notice of the capture and condemnation had arrived at the same time, would the underwriters have been precluded from saying that the judgment of the foreign court was conclusive in their favour? I think that they would not have been so precluded.

"With respect to the goods, the agreement says, that the assured were to show by the bills of lading the property of the tobacco. If the question had related solely to the goods, it might have been one of more doubtful solution; because as to them a proof is pointed out by bills of lading; but as to the ship, it is left to proof generally. It is contended, that this shows that the underwriters were to ask no more. The argument upon this head would have been much stronger, if there had been no case of capture or seizure, or a capture and seizure without condemnation; but there might have been many such cases.

"Upon the whole, I incline to think that the underwriters did not mean to part with their legal rights of holding such sentences to be conclusive against the warranty, at least I cannot, on the doubtful words of this agreement, hold that they did, in a matter which it appears the parties had not fully understood."

Justice Laurence's
 Opinion.

JUSTICE LAURENCE.—"The question put for our consideration is principally, if the assured could have recovered on the bills which might have been granted them payable at four months' date for the sum in the policy. I think the assured could have recovered on such bills. The bills would have been given without ground, or in



porance of the fact, but on the voluntary act of the parties. *That*, in my opinion, would have supported the consideration of the bills.

"But to take up the question on this narrow ground would not be to satisfy the intention of your Lordships. I shall therefore consider, 1. Whether the agreement shuts out the sentence of condemnation? and, 2. What is the effect of such a sentence?"

"As to the first, it is probable that neither party understood the matter sufficiently. It is by no means clear that the underwriters meant to vary the terms of what the policy really inferred as to warranty. Had there been no such agreement, it is clear that there would have been no such demand against the underwriters." (Here the Lordship read the relative agreement, making observations on it as he passed along.)

"By the stipulation of proof, that the ship is an American bottom, and the parties seem to have meant, rather to narrow the extent of the warranty than to alter the nature of the proof. The agreeing to settle by granting bills at four months' date does not vary the obligation on the underwriters. I think it may be held, that if the agreement had been to pay the money, instead of granting such bills, even in that case the underwriters would not have been obliged to pay it. The assured were to produce proofs; and the underwriters were to be let into contrary proof. Is the latter's evidence by production of the foreign sentence conclusive against all other proof?"

"Then it is said the assured were to use their best endeavours to cover the property as for account of the shippers. It appears to me that there is a fallacy in the assured founding any thing on this. In many cases, the endeavours of the assured might have been of use, but in case of condemnation following hostile capture, they could have been of none.

"The main point to be considered is, therefore, the effect of the judgment of the prize courts, not only *in rem*, but collaterally. It is now too late to inquire what the effect of these ought to be. For a long series of years a uniform course of decision has obtained with regard to these, and contracts of insurance have been entered into with respect to such cases. A warranty of necessity must now, I think, be held to contain a proposition, that if it be negated by the sentence of a foreign court of proper jurisdiction, it is then gone.

"The courts in this country have never gone into such sentences, but with a view to discover their grounds. If the sentences are pronounced by courts having no jurisdiction, then *that* may be matter for opening up; but, in cases of hostile capture, and where no such objection to the jurisdiction is pleadable, that of itself is sufficient. In the style of the courts in this case, it would seem that they have a larger jurisdiction than merely relative to hostile capture.

It was not denied by Mr. Attorney-General, that sentences should be looked into, to see if the condemnation was not on the

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LOTHIAN, &c.

"

HENDERSON,
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1803. transgression of some revenue law. By the same parity of reasoning, they may be looked into on other points, as where this point of enemies' property is not distinctly stated. The first case of this kind was that of *Bernardi v. Motteaux*, Doug. p. 575; *Park Ins.* p. 353. (This case his Lordship particularly stated.)

7 Term, Rep. p. 681. "The authority of Lord Mansfield, in such a case, is very great. It was well known, that when he was Solicitor-General, he had particularly considered questions of prize. In the case of *Geyer v. Aguilar*, which is so similar to the present, the Court acted in the same manner, of looking into the sentence to see what it contained.

"Having said this much, it only remains to examine the grounds of the sentence in this case. (Here he read the sentence.) I think it is clearly stated that the tribunals condemned the ship and cargo as enemies' property. This being so declared, the other parts of the sentence cannot be looked into.

"For these reasons, my opinion is, that the agreement does not shut out the sentence of condemnation."

Justice
Rooke's
Opinion.

JUSTICE ROOKE.—"In the policy, the Catherine is called an American ship, which amounted to a warranty. The explanatory agreement was afterwards made, which has the signature of the underwriters alone. By the rules of law, if it be doubtful or incorrect, it must be interpreted favourably for the assured rather than against them. (Reads the agreement.) This agreement is made with a view to capture and seizure only, and that the property might be recovered back.

"The whole doubt in this case arises upon the word proof. I think it means such proof as should be satisfactory between man and man. I cannot see a case where no endeavours could be used for recovering back the ship and cargo, but that of condemnation. If so, I can never set up the judgment of condemnation against the proof that I have just stated.

"I put this construction upon the word proof, as similar stipulations occur in policies of insurance from fire, which are thus understood and acted upon. Having regard to this agreement, therefore, I think the assured could have recovered on the bills in question.

"But if you think me wrong upon the agreement, then I am clear from all the cases, from *Hughes v. Cornelius*, downwards to that of *Geyer v. Aguilar*, that, on the soundest policy, the sentences of foreign courts of Admiralty are held to be conclusive as to what they declared upon the face of them."

Baron Thom-
son's Opinion.

BARON THOMSON.—"I shall *first* consider how far the policy must be held to be a warranty; and, *2nd*, How far it is varied by the explanatory agreement.

"Now, whatever doubt the parties had, it is clear that the description was equivalent to a warranty. The counsel for the respondents did not contend for the contrary.

"That subsequent instrument recites that doubts had arisen

at the warranty. On the best consideration I have been able to
to this agreement, I do not think that it was meant that im-
it credit was to be given to the proofs there mentioned, without
ng leave to prove the contrary. With regard to the ship, no proof
tever is specified, but only as to the cargo.

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The using endeavours to recover the ship seems to me to mean
more than the words of style, which appear to a similar effect in
policy itself.

If this explanatory agreement does not narrow the warranty, it
ears to me to be clearly established, from many decisions quoted
he bar, that when a warranty is negatived by a sentence of con-
nation of a foreign court, this relieves the assurers. When the
rts have entered into such sentences, it has been, in cases where
y did not appear to negative the facts which the policy warranted.
sentence in this case is the same as in that of *Geyer v. Aguilar*.
If right in thinking that the agreement did not negative the
ranty in the policy, I think, if the bills had been granted after a
tence of condemnation negativing this warranty, the granters
ld not have been bound to pay them."

Justice Gross.—(He spoke in so low a tone of voice that he
ld only be heard at intervals.) Justice Gross'
Opinion.

Previous to the date of the present policy, a war had taken
ce with France. I agree that the law forces the assured to prove
ir warranty, and that a condemnation as enemies' property is con-
sive against a contrary warranty.

The parties have had doubts as to the warranty, whether such ex-
dor not, and if it did exist, as to what was the meaning of it? I
'most upon the word '*settled*.' I think this meant a final agree-
t; and that a condemnation might probably follow upon cap-
and seizure, was a matter understood and known to the parties,
he consequences of it were renounced.

Looking to the state of things at the time of the agreement, and
e words of it, I think the assured were entitled to be paid by
at four months' date."

Justice Heath.—"After the ample discussion already given to
ase, I shall contract what I had to say thereon. Justice
Heath's
Opinion.

The agreement, in this case, was inaccurate, but its meaning is
that the parties meant to ascertain the property, in case of
re and seizure. The underwriters, on the consideration of a
premium, were to take the risk of condemnation on themselves.
matter of the high premium is well stated in the Lord Ord-
s interlocutor.

In every executory agreement, parties may make what stipula-
as to proof they please. In the case of insurance by the fire
es, it is usual to require that the assured shall produce a certifi-
in his favour by the master and church wardens of the parish,
ch has been acted upon.

The time within which the proof was to be adduced is material.

1803. A question was asked, what would have been the effect if the c
 ——— ture and condemnation had been heard of at the sametime.—I th
 LOTHIAN, &c. it would not have altered the stipulation as to proof.
 v.
 HENDERSON, “ For these reasons I think they were entitled to have recovered
 &c. these bills.

“ On the conclusiveness of the foreign sentences I am of opin
 with my brethren.”

Baron Ho-
 tham's
 Opinion.

BARON HOTHAM —“ In my opinion the parties meant, by capt
 and seizure, a total loss. The policy and explanatory paper u
 be taken to be parts of the same agreement. There was noth
 in the policy to prevent parties from entering into a further ag
 ment as to proof.

“ The policy was thought to have left matters too loose. ‘
 warranty was not then in litigation. The owners undertook to p
 duce proof of the ship and goods being American; and, on pro
 duction of these proofs, the underwriters were to settle.

“ Have these things been done? All that the agreement requ
 ed on the part of the assured has been complied with. But i
 different as to the underwriters; it was impossible for them no
 have seen that condemnation was a possible case. Against w
 were the assured to use their best endeavours to recover the prop
 but against a seizing enemy. They meant to set aside the cond
 nation of the foreign sentences altogether. The agreement seem
 me explicitly to say, ‘ let the event be what it may, it matters
 thing to us, we stipulate for no more but the production of p
 that the ship was an American bottom, and bills of lading to al
 the property of the tobacco.’

“ On this my opinion rests. Nothing of what was argued as
 the political danger of supporting such agreements can enter into
 contemplation, sitting here, as we do, in a *judicial* capacity.

“ On the points of warranty, and the conclusiveness of forei
 sentences, I concur with my brethren.”

Lord Chief
 Baron's
 Opinion.

LORD CHIEF BARON.—(His Lordship was very brief: His op
 ion being, that the relative agreement had taken this case out of t
 general rule of law; that the assured had done all they were requ
 ed to do by that agreement; and that the bills at four months' d
 ought to have been granted, and might have been sued on.

As to the conclusiveness of foreign sentences, he concurred w
 his brethren.)

THE LORD CHANCELLOR (ELDON).—Read a speech of some leng
 (but as it was repeated afterwards, in giving final judgment, as t
 low, it is not inserted here), and moved that judgment be deferred

On the 15th July case resumed.

And the Judges having delivered their opinions thereon.

THE LORD CHANCELLOR (ELDON) said:—

“ My Lords,

“ I may state, in the commencement, in the necessary absence

a noble and learned Lord, (Lord Ellenborough,) that I am in possession of his judgment, and that he concurs in opinion with me.

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(His Lordship stated particularly the policy, relative agreement, judgments of the foreign Prize courts, of the Court of Admiralty in Scotland, and Court of Session.)

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"The first and last, and continued impression upon my mind has been, and is, that the policy and explanatory agreement were the sole grounds upon which this cause was to be decided. When it was first argued, a noble and learned Lord, who attended the hearing, had great doubts of many cases that had been decided. and of applying the case of *Cornelius v. Hughes*, which was a decision *in rem*, to cases like this, where the parties are totally different.

"Another noble and learned Lord now present, was of opinion, Lord Alvan- that whatever doubts upon this subject might have been entertained originally, and though there might have been a mistake in the principle, yet there had been such a series of decisions as could not now be disturbed but by the Legislature. He was also then of opinion that it would be necessary to decide the case as if the policy was not altered by the relative agreement.

"Your Lordships therefore deemed it expedient to call for the opinions of the judges, as to what the law of England would have decided upon the case, that you might apply the best judgment as should appear to be proper. The question put to the judges adverted to the legal meaning and effect of the policy, and relative agreement, and of the foreign sentences. It comprehended also the particular circumstances of the case, and one, among others, which appeared to require much attention, namely, That while it was admitted that the *Catherine*, when captured, had on board every document which American ships usually had at the time of her sailing, the *Arrêt* requiring ships to have on board a *role d'Equipage*, neither was nor could be known in America, when the ship sailed. The question also noticed the point, if the money could have been recovered on the bills that might have been granted in terms of the relative agreement.

"Though the judges were not unanimous in their opinions upon every point of the question put to them, I may venture to say, that there was no disagreement among them as to this, that where there is an express warranty, in a policy against enemies' property, an adjudication, or condemnation of enemies' property, distinctly stated in the judgment of a prize court, negatives the warranty.

"This doctrine may have arisen, perhaps, from some such circumstance as the assured suing on a policy, and producing in evidence the sentence of a court condemning as enemies' property, to enable them to recover the sum in the policy. The defendants, in case of a warranty against enemies' property, might turn round and say, 'you have produced evidence conclusive against yourself.' In some of the original cases applying a decision *in rem* collaterally to a case

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of insurance, it was stated that all parties might have come in before the prize court *pro interesse suo*. I may say, that it is founded in mistake, to have supposed that the underwriters could have come in.

“ But I cannot be so bold as to say, that the doctrine of the case of Hughes and Cornelius is not now to be applied to cases of insurance, after it has been so applied for a long series of years by judges who will be revered as long as the law of the country is remembered. Sums of money to a very great amount have been long since settled on the ground of these decisions; and all contracts of insurance that have since been entered into, have had relation to these decided cases.

“ But there is another and more recent set of cases, in which the courts of law have entered into the sentences, when founded, as they are conceived, upon arbitrary ordinances. If they could find no direct adjudication of enemies' property, our courts have held such sentences not to be conclusive. Of these, I think it proper to state that they have not, in my opinion, attained such a degree of stability as not to render it highly proper to examine the principle maturely when a case of this kind may occur. I think, at present, should have great difficulty in acknowledging the authority of some of these cases.

“ While I have to thank the judges for their opinions given upon this case, I do not know that one point has been sufficiently considered in this case. Granting the conclusiveness of sentences, negating the warranty in general cases of condemnation as enemies' property; yet here, it appears upon the face of the sentence, that the ship could not be provided with the proper document, for the want of which she was condemned. I am not prepared at present to say, that this should make no difference in the judgment. Whether the two parties to a contract of this nature are unavoidably ignorant of some matter, similar to that in the present case, it seems to me a question, if such ignorance ought not to void the contract altogether as made under an invincible mistake, and whether the premium ought not to be returned? I state no opinion upon this, but merely throw it out, and I wish so to guard the judgment in this cause, as not to preclude a discussion of this point, if a similar case occur.

Lord Thurlow.

“ The next question is, if it be necessary at present to decide any of those important points, which have been so much agitated in this case. I have considered this again and again, and the ultimate impression of my mind is, that the parties meant to get clear of all these questions. A noble and learned Lord now absent, to whom I may say that Scotland is very deeply indebted for his attention to questions from that country, was of a different opinion. You have heard the opinions of four very eminent judges also to the same purpose. Your Lordships must decide between us.

“ When the policy was entered into, it was very difficult to say what would be the decision of the French courts on any given case. Another thing is clear, that these parties did not very well understand whether or not the policy contained a warranty, and what was the effect of such warranty. I take it to be clear law, that the representation in this policy, that the Catherine was an American vessel, meant a warranty that she should be American documented. It appears, however, that neither party understood the warranty in the policy to mean so much. In the explanatory agreement they declare their doubts of there being a warranty at all, and go on to explain what they understood by it. Am I not also, by all the legitimate rules of construction, to say, that they have regulated all that was to be done by either party. If the agreement has not this effect, what effect had it at all?” (Here his Lordship read the agreement.)

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“ It will be noticed, that as to the ship, the words of the *agreement* differ from those of the *policy*; the insured were to produce proof of the ship's being an American bottom. My apprehension of their meaning upon this subject was, that proof of the ship's being an American bottom, was to be sufficient; not that she should be American documented. So, in the case of the property on board, the production of the bills of lading was to be sufficient.

“ What were the underwriters to do when these stipulations were complied with? There may be cases of capture and restitution, capture and recapture, and capture and condemnation. These proofs (agreed on) might have been given long before recapture or condemnation. Do they propose to wait till they should see the fate of this ship? No: They agree to settle by giving their bills at four months' date.

“ It was contended that this settlement was liable to be undone; and it was asked, what would have happened if notice of the capture and condemnation had arrived at same time? I do not see any ground on which the bills could have been demanded back, and I think an action would have lain against the underwriters if they refused to grant the bills.

“ The agreement states, ‘ in full dependance that the insured will use their best endeavours to recover the property, as for account of ‘ the shippers.’ It is true, that though this be a case of condemnation, there were other cases in which the endeavours of the insured might have been useful. But they did not state that such endeavours should be effectual. In using their best endeavours to prevent condemnation, they did every thing that was required of them; and after having done so, the underwriters engaged to pay, if these were not effectual. It appears to me that any other interpretation would do away the effect of the relative agreement altogether, and render it as if it never had been entered into.

“ In therefore moving what appears to me to be the judgment fit

1803. for the House to pronounce upon this occasion, it seems proper to state, that your Lordships do not proceed on the conclusiveness or inconclusiveness of the foreign sentences, but on the special circumstances of the present case. It also seems to me proper to declare, that it is not necessary to decide many of the points mentioned in the Lord Ordinary's interlocutor; but to affirm the interlocutor of the Court of the 27th of June 1800, with a slight alteration."

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(His Lordship having made a motion to this effect.)

LORD ALVANLEY said,

" My Lords,

" I shall trouble your Lordships very shortly; but after the great variety of topics which have arisen in this cause, and the difference of opinion among the judges, I must briefly state the grounds of my own opinion.

" The decisions in Westminster Hall have now, for nearly fifty years, been uniform upon this point, that an adjudication of enemies' property in a foreign Prize court negatives a warranty of neutrality in a policy of insurance. On such decisions, property to the amount of many millions has been paid. I was very much surprised, in the outset of this case, to hear these decisions questioned; and an argument raised, that they might still be set aside, as none of them had yet been affirmed in this House. If the judgments of the Courts of law, after such a series of years, had been set aside, I should not have been surprised if the underwriters had shut up Westminster Hall altogether. At sametime, I think that the noble and learned Lord (Thurlow) now absent, would not have wished to set aside those commercial decisions. Every subsequent policy of insurance has been entered into in contemplation of them. We are unfortunately again engaged in a war, in which such questions may occur; but no mischief can now arise from the agitation of that question.

" I now come to the relative agreement. When I first considered this, I doubted if the agitation of the other question could then be waived. Let us see what is the effect of the policy without this relative agreement. The parties follow the words of the English policy. It has been long decided that such words amount to a warranty, not only of American property, but of American documented and conducted. This was a war policy; and I admit it did go the length contended for by the appellants, that it was the same as if the ship had been warranted neutral.

" It seems that the parties were not aware of the extent of this. (Here his Lordship read the relative agreement). This is merely an illusion, if an American *bottom* meant the same as an American vessel. What was to be the consequence if she was carried into the enemy's port? The assured undertook to get it back if they could; but, if they were unsuccessful, what then? Is it possible that they should have failed to stipulate that? The only real object of the parties in this agreement was that they should, in that

do what was equivalent to paying in ready money, that is, bills at four months' date. They must have meant, that what was the extent of the policy, if proof was produced that the ship was on an American bottom, the assured were to be absolved from all circumstances.

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I entirely concur with the noble and learned Lord who has just said, as well upon this case as upon the set of cases to which he has alluded, in which the judgments of foreign courts have been opened. I admit that very strong arguments in the present case were urged by those judges from whom we differed in opinion. I entirely agree with the opinion delivered by the present Master of the Rolls, in the case of Kindersley and Chafe, at the Cockpit. I am afraid that some of the cases in which the foreign judgments have been opened up, went on too refined principles. In our Prize cases, we never give any reasons at all in the judgments of condemnation. I do not know if the courts of other countries canvas our reasons or not. I do not see what the ground of condemnation in this court can be, except that of enemies' property."

It was declared, that in this case it is not necessary to decide whether, upon the several grounds mentioned in the interlocutors of the 28th May and 2d July 1799, the Lord Ordinary ought to have pronounced the same. And it is ordered and adjudged that the interlocutors of the 27th of June, and signed the 4th of July 1800, complained of in the appeal, be affirmed, with the following variation: After the second ("Find that") insert the words according to the effect of the agreement contained in the policy and relative writing. And it is further ordered and adjudged, that the interlocutor of the 22d of November 1800, also complained of in the said appeal, be affirmed.

For the Appellants, *Robert Dallas, Wm. Adam, W. Robertson.*

For the Respondents, *E. Law, J. A. Park.*

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[M. App. Superior and Vassal, No. 3.]

SYME,
v.
ERSKINE, &c.

JOHN SYME, W.S., for himself, and as Trustee for the Creditors of JOHN RANALDSON of Blairhall, } *Appellant*;

SIR WILLIAM ERSKINE of Tory, Bart., eldest son of the late Sir WILLIAM ERSKINE of Tory, Bart., and Sir WM. FORBES, Bart., and ALEX. FORBES, Esq., second son of the late DAVID FORBES, W.S., and others, his Trustees, } *Respondents*.

House of Lords, 22d July 1803.

SUPERIOR AND VASSAL—WARRANTICE—DAMAGES—PENAL ACTION.

—A superior and his agent gave a vassal an entry, after the superior had divested himself, by a sale of the superiority, to another superior. The consequence of this was, that a title made up as of fee to an entailed estate, was disappointed and rendered invalid. In an action of relief and damages raised, after the death both of the superior and his agent, brought against their heirs and representatives, Held that an action, penal in its nature, did not transmit against heirs, and that, besides, here the entry so taken, was devised to defeat the entail, and therefore *versans in illicito*.

John Ranaldson inherited certain estates descending to him by entail, namely, Blairhall, and the lands of Longleys and Westerbroom, purchased by his father from Doctor Erskine, who retained the superiority.

He had made up titles to Blairhall under the entail, but not to those of Longleys and Westerbroom, having in view to claim the fee of these lands, although the entail included them.

In consequence of his father's debts, and his own, he was 1786and1789. obliged to execute a trust deed in favour of the appellant, for behoof of his creditors, conveying the rents of the estate of Blairhall, and the fee of the lands of Longleys and Westerbroom. This deed was acceded to by most of his creditors, and in particular, by the appellant and by John Ranaldson's mother, and Mrs. Ann Ranaldson Dickson, and his other sisters, who were next heir substitutes of entail.

The appellant, as trustee, then proceeded to complete his title under the trust-deed. In doing so, it was necessary to apply to the superior for a precept of clare in favour of John Ranaldson as to these lands. This was done by applying to the late David Forbes, agent to the late Sir William Erskine, the superior, in the following manner.

“ J. Syme presents compliments to Mr. Forbes, he will
 “ be so good as make out a precept of *clare constat* in favour
 “ of Mr. Ranaldson as soon as possible.—Windmill Street,
 “ Friday.”

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Mr. Forbes, without stating that his client had, some time ago, sold the superiority of these lands to Mr. Mutter, and, consequently, could not grant such, immediately prepared a scroll of a precept, which was marked by him on the 28th of Sept. The precept itself was signed by Sir William Erskine, as superior, on 22d October 1789, and this having been notified by Mr. Forbes to the appellant, Mr. Syme wrote in the following terms : “ Mr. Syme presents compliments to Mr. Forbes, and
 “ begs he will give the bearer the precept of *clare constat* in
 “ favour of Mr. Ranaldson, with the disposition and infeftment.
 “ in favour of his father. J. S. begs leave to send by the
 “ bearer the fees. Mr. Forbes will please send a receipt for
 “ the feu duty.—27th October 1789.”

Mr. Forbes answered : “ Mr. Forbes returns compliments
 “ to Mr. Syme, whose card he has just now received. Giv-
 “ ing up the precept infers discharge of the feu duty, but Mr.
 “ Syme should have shown that preceding 1787 it has been
 “ paid, and therefore he will please send for the discharges
 “ of them ; or write to Mr. William Gulland, Sir William
 “ Erskine’s factor at Tory, to know if the feu-duties preced-
 “ ing the 1787 have been paid.—28th October.”

After further correspondence, and upon payment of the years’ feu-duty, from 1788 to 1789, and the fees for the precept of *clare* ; the precept was delivered over, and an infeftment was taken upon it in favour of Mr. Ranaldson. He died in 1796, having the year before granted a disposition of his whole heritable and moveable property, including the lands in question, to the appellant, in trust for his creditors. On this trust, he proceeded to sell these lands, at the sale of which the blunder was discovered, that they had taken a title from the wrong superior ; whereupon the next heir of entail, Miss Ann Ranaldson interfered, and raised an action of reduction, and succeeded in reducing the title, which, but for the blunder, she could not have done, because John Ranaldson, as disponent in the entail, was entitled to take up the estate as in fee.

After both Sir William Erskine’s and Mr. Forbes’ death, the present action of relief was then raised against Sir William Erskine, as representing his father, and his agent’s representatives, to indemnify for the loss thus occasioned.

1803. In defence, it was pleaded, 1st. That the precept of *clare constat* neither gave nor implied any warranty that the granter was truly the superior ; 2d. That the appellant had himself to blame for the mistake, which his application to Mr. Forbes, and his conduct in the business occasioned ; 3dly. That as it originated in a fraudulent scheme of the late Mr. Ranaldson, to defeat his father's entail, in which the appellant, as the agent of that gentleman, and to serve his own private views, participated, they could not be suffered to make the defeat of that scheme, whether from accident or negligence, a ground of an action of damages. 4th. That as Mr. Ranaldson could have qualified no damage, because, if he had succeeded obtaining a good title, which a purchaser might have relied on, and had sold the property, he must still have been answerable for the full amount, at least to the heirs of entail, in defraud of whom he acted. And, lastly, that actions penal in their nature do not transmit against heirs. The Court allowed a proof of the circumstances.

It was proved that David Forbes, as the superior's agent, had revised the disposition and sale of the superiority to Mutter in his own hand writing, in June 1788 ; that it was engrossed in the chartulary, five pages distant from the *precept of clare constat*—that he had taken a bond for the price of the superiority lands, and that a settlement of accounts between David Forbes and his client had taken place, in Mar. 11, 1800. which the transactions were set forth.

The Lord Ordinary pronounced this interlocutor, “ Having considered the mutual memorials for the parties, assoilzies the defenders simpliciter, and decerns, supersedes extract Jan. 21, and “ till the third sederunt day in May next, and dispenses June 16, 1801. “ with representation.” On two reclaiming petitions the “ Court adhered.*

* LORD PRESIDENT CAMPBELL said,—“ This is a question arising from a wrong superior giving an entry, and the investiture being thereby null ; and, consequently, whether he and his doer are liable in damages on that account ? There appears to me to be strong reasons for sustaining such a claim, unless, in this case, the pursuer can be met by a personal exception, as *versans in illicito* ; for he was acting wrongfully in making up such a title contrary to the entail, and thereby involving his constituent, Mr. John Ranaldson, in an irritancy. It, no doubt, was for the interest of the creditors that a title in fee simple should be made up, or at least that their debts should attach upon the estate. It is a question if this would have

against these interlocutors the present appeal was
 brought to the House of Lords. 1803.

Added for the Appellant.—If Sir William Erskine had
 been superior of the lands of Longleys and Westerbroom, at
 the time he granted the precept of *clare* by the advice of
 the learned counsel, Mr. Forbes, it is quite clear that the appellant,
 and his creditors of Mr. Ranaldson, who had acceded to
 the last deeds granted by him, on the faith of his making
 good title to the lands in fee simple, might have sold these
 lands and applied the price towards extinction of the debts,
 without the possibility of challenge from the heirs of entail; be-
 cause it is a settled point, that when the substitute of an en-
 tail makes up his titles, referring to the different restrictions
 put out without narrating them *verbatim*, the entail is in-
 valid against creditors. Or if the superior even had re-
 fused to grant a precept of *clare constat*, the right of the ap-
 pellant and other creditors might have been completed
in rem, by charging John Ranaldson to enter heir to his
 father; but the appellant was prevented from having re-

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acted if a feudal title had been made up under the entail, while
 the tailzie was unrecorded; or if adjudication had then been led
 against him upon a charge to enter. Case of Ross of Thurso. *Vide*
Lady Glencairn v. Graham of Gartmore, 23d May 1800,
 pp. No. 1, "Heir apparent." Andrew Ranaldson died
 on the 10th October 1778. The tailzie was recorded 14th January 1779.
 He was the institute in the entail. He passed a charter upon the
 property, 6th August 1781, and was infeft 19th June 1784.
 Now, I doubt if a penal action can transmit against the heirs.
Lord v. Thomson, 21st Dec. 1793. (Unreported.) This latter
 was an action of damages brought against the heir of a notary
 who had given an erroneous notarial intimation, thirty-nine years be-
 fore, whereby the assignation was rendered useless, to the effect of
 a preference in competition with creditors. The Lord Ordinar
 found the heir liable in damages. But, on reclaiming petition
 to the Court, the Lords were much divided on the subject, and the
 case was finally compromised."

D MEADOWBANK.—"*Versans in illicito* is not a sufficient de-
 fence, but I have doubts on the merits. The maxim ought to ap-
 ply—Penal actions *Non transit contra hæredes*."

D BANNATYNE.—"I think that Sir William Erskine and the
 learned counsel Mr. Forbes are both liable."

D POLKEMMET.—"I think *versans in illicito* a good defence."

D GLENLEFF.—"I think this action, which is penal, not good
 against the heirs."

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course to this mode, from relying on the precept of *clare* being granted by the right superior, he having every right to believe him such, from paying him the feu-duty, and not being told by Mr. Forbes, at the time, on application for the precept, that his client was not then superior, and therefore, in consequence of their gross negligence, the appellants are entitled to relief. The respondents' ancestors had no excuse. They could not plead ignorance, for the sale of the superiority had only taken place a year previously, when the whole affair must have been fresh in their recollection, yet not the remotest hint is given of the matter, and Sir William Erskine signs the precept of *clare constat*, for the usual gratuity and fees, on the representation that he was still superior.

Pleaded for the Respondents.—The granter of a precept of *clare constat* comes under no engagement to warrant its efficacy, express or implied. It generally bears to be granted *salvo jure cujuslibet*, and, at any rate, that is understood. The nature and course of the proceeding demonstrate that this must be the case. And it is always granted on application of the vassal, on such evidence as he may tender, and as a matter of favour, and to save him the circuitous mode and expense of a special service. It is also granted *periculo*

B. iii. tit. 5, §
26.

petentis. Lord Stair says:—"Infeftment being passed on such a precept, giveth the party the real right of the lands, if done by the right superior. It will not be sufficient title as to the real right of the ground against any other party than those who acknowledge the giver thereof to be the superior, and the receiver to be heir. For if, upon any other colourable title, they question any of these, the infeftment and precept of *clare constat* will not be sufficient alone, unless it have obtained the benefit of a possessory judgment or prescription." From this doctrine, it follows, that the vassal or receiver of such a precept, was always bound at all times to show that the granter was the true superior. The appellant therefore was to blame in the matter, for not satisfying himself. Being employed to make up the title, he ought to have inquired into the right superior. He never put the question to Mr. Forbes. All that he seemed anxious for, was to get the precept of *clare* in a great hurry, in order to cut out the heirs of entail from claiming the lands in question. Looking, therefore, to this circumstance, and to this hurry, and to the fact that Mr. David Forbes was then eighty-two years of age, at which some want of recollection is allowable,

he blame rather lay with the appellant. At all events, he who seeks damages, ought to come into the Court with clean hands. The appellant and his employer were intending to resort to a scheme, by which the persons entitled to succeed under the entail, were to be defrauded of their rights. The appellant says he had the consent of the next heir, but there were many whose consent he had not. Besides, as the appellant can only plead in room, and in right of John Ranaldson, and could have no better right than he had, which was none under the entail,—as he could not have specified any damages, so neither can the appellant. Besides, penal actions cannot be maintained against the respondents, Sir William Erskine and Mr. Forbes' representatives, on account of alleged fault of those whom they represent. For the culpable act of an ancestor, the heir is not liable, and therefore, on this ground alone, the action must fall.

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After hearing counsel, it was
Ordered and adjudged that the appeal be dismissed, and
that the interlocutors therein complained of be, and the
same are hereby affirmed.

For Appellant, *John Clerk, David Douglas.*

For Respondents, *C. Hope, Wm. Adam.*

JAMES RUTHERFORD of Ashintully	-	<i>Appellant ;</i>
JAMES STORMONTH, Esq.	-	<i>Respondent.</i>

House of Lords, 25th July 1803.

SERVITUDE OF COMMON PROPERTY, OR OF COMMON—PRESCRIPTIVE POSSESSION. — The appellant and the respondent's estates marched with each other. The former claimed a right of servitude of common, for pasturing his cattle, and casting fuel, feal, and divot, upon ground claimed exclusively by the respondent, who brought a declarator to have such right set aside. It appeared that the appellant founded on a decree arbitral, so far back as 1577; but, since that date, the marches had been changed by agreement of parties, and a new stone dike built to mark the division. The appellant, however, sometimes pastured his cattle on a patch of the lands. Held that he had no right of common, and that the respondent had exclusive right to all the lands on his side of the march, and that the parties had no

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right of common property, or servitude of any kind, the one against the other.

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The appellant purchased the lands of Ashintully, situated in the highlands of Perthshire, in 1780; and nearly about the same time, the respondent acquired right to the Lands of Whitehill, or Mortcloich, which are adjoining to the appellant's lands.

The appellant having laid claim to a right of common property in a piece of ground of about 120 acres, called the Corry of Mortcloich, which, for more than two centuries, had been considered as part of the respondent's lands of Whitehill or Mortcloich, he was obliged to bring the present action of declarator, to have it found that this piece of ground belonged exclusively to him, and was subject to no servitude or right of common property on the part of the appellant, nor any right to pasture sheep, or cast peats upon the said property, which belonged to the respondent.

It appeared that disputes had arisen between the previous proprietors of both lands, as to the right of property between them and their respective marches, which were submitted to arbitration, and the following decree arbitral pronounced in 1757. This decree fixed and laid down the march line, and stones between the two lands, and declared that all on the east side of the marches should pertain in property to the predecessors of the appellant, and that all on the west side thereof should pertain likewise in property to the respondent's predecessor. After which there follows an exception in these words: "Except that piece of ground and moss from the said Corryvoigle at the east of the said meiths (boundaries) to a well and a strype (run of water) that runs therefrom into the burn of Autinagarrall, at the west, and up the said well to two great grey stones, and in the upper end of the same are crescents also engraves, to be used as common by the said parties and their tenants respectively, in all time coming, by casting of fuel, feal and divot, and to the Gudes cattle of Mortcloich to pasture thereon without impediment." And after the testing clause there is the following: "Providing that the piece land called Croftnastrae, otherwise the Stripe Croft, on the west side of the burn, be common to both the said parties, and their tenants, in time coming."

It was on this decree, and the alleged possession following thereon, that the appellant claimed his right. It was

farther maintained by him, that the rivulet or burn of Autinagarrall, now called the Burn of Ashintully, divided the two estates of Ashintully and Mortcloich, from the foot of Corryvoigle all the way southward, but ran in a very winding direction. At Corryvoigle the boundary left the rivulet to the west, and ascended the hills in a direction to the north-east, by the line marked by the stones numbered 1 to 14, all which stones remained to this day, bearing the engraved crescent mentioned in the decret arbitral 1577. And the parties were agreed that this was the boundary of the two lands up to the year 1771, when, for the sake of enclosing the lands of Ashintully by stone walls, a line was drawn from the Corry ford southward, intersecting the rivulet at different places, but keeping very near it. With the same view, another line was drawn from the Ford in a north-east direction to the Hill of Knocknedy, including a very small portion of the land to the west of the first five march stones set up in 1577.

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It was also alleged by him, that the proprietor and tenants of Ashintully had, from time immemorial, pastured their cattle upon that tract of land *which is on the west, or Mortcloich side of the line of march* described in the decret arbitral, and to the southward of it, and northward from that point up as far as the 12th march stone or Relach, which tract is called Corry of Mortcloich.

The respondent, on the other hand, contended, and offered to prove, that the boundaries between the two properties were always those as fixed by the decret arbitral in 1577; and as to the claims of servitude or commonty which Ashintully had by the said decree over the lands of Mortcloich, that these were given up in 1771, on the occasion of straightening the marches, with a view to enclose the lands. This was done by arbitrators mutually chosen, and the whole settled and adjusted by ordering a stone wall to be erected to form the march between the two properties. This was proved by letters of agreement and other documents lodged in process.

A proof was allowed; and, being reported, the Lord Ordinary (Justice Clerk M'Queen) pronounced this interlocutor: "Having considered the state of the process, proof Feb. 7, 1797. "adduced, and writs produced, &c., finds that the line of "march between the lands of Whitehill *alias* Mortcloich, "belonging to the pursuer (respondent), and the lands of "Ashintully, belonging to the defender, was fixed and as-

1803. "certained by the decret arbitral produced, bearing date
 "the 5th of June 1577; and finds, that the said march line
 RUTHERFORD "is to be the rule in all time coming, except in so far as the
 v. "same has been altered by these parties and their prede-
 STORMONTH. "cessors, by a stone dike built along the burn side of Ash-
 "intully, which dike, instead of the burn, is now to be the
 "march between the said parties their lands, in all time
 "coming; and also, excepting in so far as the same has
 "been altered by a stone dike leading from the said burn
 "in a north-easterly direction to the Shank of Knockan-
 "dyne, which includes five of the old march stones to the
 "east of said dikes; and that the said march line is to run
 "in a straight line from the uppermost, or fifth, of these
 "stones, to the south march stone west of said dike, and
 "from thence by the chain of march stones and summits
 "described in the said decret arbitral, till it reach the
 "highest summit marching with Glenshee, as described in
 "the plan produced, and marked by the Lord Ordinary as
 "relative thereto. And finds, that all the grounds on the
 "west of the foresaid line is the exclusive property of the
 "pursuer, and that all the grounds on the east of the said
 "line is the exclusive property of the defender; and that
 "neither of the parties have a right of common property
 "or servitude of any kind whatever, upon the other party's
 "lands, bounded and described as aforesaid; and decerns
 "and declares accordingly."

To this judgment his Lordship adhered by various inter-
 Nov. 30, 1797. locutors, the last of which is dated 30th Nov. 1797.

On reclaiming petition to the Court, and farther procedure
 June 26, 1798. had, the Lords, by several interlocutors, finally adhered to
 Nov. 28, — the above interlocutor.

May 28, 1799. Against these interlocutors the present appeal was
 Jan. 14, 1800. brought to the House of Lords.

Feb. 12, — *Pleaded for the Appellant.*—It is established by the
 Mar. 11, — proofs in the cause, that the proprietors of the estate of
 July 1, — Ashintully, and their tenants, have been in the uninterrupted
 July 4, — enjoyment of a privilege of pasturing upon, and other-
 Nov. 17, — wise using the lands called the Corry of Mortcloich, as a
 Feb. 4, 1801. property, common between them and the proprietors of
 Whitefield, or as subject to a servitude of pasturage, and
 casting fuel, feal and divot, or peats and turf, at least since
 the year 1577. Nor is it any answer to this, to say that
 this was a mere tolerance allowed, according to the custom
 of that part of the country between conterminous proprie-

ors of uninclosed lands, because it is further established by the decree arbitral itself, which specially excepts the lands in question, as common or servitude lands. The uniform possession of the proprietors of Ashintully and their tenants, is proved by witnesses that this was ascribed to a right held over the lands of Mortcloich, and not to a mere tolerance. But even supposing that the right of pasturing in the Corry of Mortcloich was not reserved by the decree arbitral 1577, or has not been acquired by prescriptive possession, the finding in the interlocutor, "That neither party has a right of common property, or servitude of any kind whatever, upon the other party's lands," is erroneous, and must be altered; because the appellant is, at any rate, entitled to a servitude upon the ground thus described in the first exception contained in the decree arbitral, "That piece of ground and moss from the Ford of Corryvoigle, at the east, up the meiths to a well and a stripe," &c. which, *ex concessis* of the respondent, comprehended what is called the Scholar's Moss, and the ground between it and the bounding line marked on the plan No. 20 and 21, extending to fifty six acres and upwards. This, together with the prescriptive possession had, ought to be sufficient to establish the servitude. No doubt, this possession was seldom exercised as to the peat, &c., but as to the pasture, it was exercised unchallenged.

No doubt it is contended that this and every other claim of servitude was given up at the time of the transaction for straightening the marches in 1771. But the proof does not afford evidence of this, but rather shows that the former possession of pasturage was continued.

Pleaded for the Respondent.—In regard to the two exceptions in the decree arbitral, the first is a servitude not of pasturage, but of casting fuel, feal and divot, upon the piece of ground and moss, the description of which cannot apply to the Corry of Mortcloich, but to Scholar's Moss, marked No. 21 on the plan. But as to this, it is established by the proof, that no such servitude was ever used by the tenants of Ashintully, either upon the Corry or upon Scholar's Moss, within the memory of man. It is therefore clear that this right of servitude was long ago lost *non utendo*; and even had it not been so, it was completely done away by the march dike erected, agreed to by the two proprietors in 1771. The other exception was deemed of so little importance that the decree arbitral was closed, and the testing

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1803. clause engrossed, before it was thought of, but the witnesses depone that they never heard that any part of Corry of Mortcloich ever bore the name of Croftnastree or Strife-croft; and that the only piece of ground known by that name, the tenants of Ashintully have never had any possession of.

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With respect to the Corry of Mortcloich, it is an open pasture field, and is surrounded on all sides by the property lands of Whitefield. It is situated on the west of the march burn, having between it and the burn, arable, meadow, and pasture ground interjected; parts of which were exchanged at settling the line of the march dike in 1771. It is declared to be the exclusive property of the estate of Whitefield, both by the decreet arbitral of 1577 and that of 1771. It is described in the appellant's summons of division as the common of Whitefield, which name has been given to it, as being possessed in common by all the *tenants of that property*. It is not alleged that any of the tenants of Ashintully did ever cast fuel, feal or divot, on this Corry, which appear to be the great criterion of property in that country; as, by mutual consent, a promiscuous pasturage of all the open grounds upon the estates of Ashintully and Whitefield took place; though their marches were perfectly known, and strictly observed, in casting fuel, feal and divot. But when the appellant became purchaser of Ashintully, he put an end to this mode of promiscuous pasturage himself, by pointing the cattle of Whitefield when they crossed the march line. But, in point of fact, all claims of common or servitude, by either of the parties, beyond their marches, was put an end to by the decree arbitral 1771, and the march dike built pursuant thereto. This march dike was also to be erected, as the decree bears, at the mutual expense of both parties, as is usual.

By the law of Scotland, no person can, by prescription, acquire a right beyond the limits of his own boundary; and unless the appellant could show a title from the proprietor of Whitefield posterior to the year 1771, his claim of common is completely barred.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Wm. Adam, Wm. Robertson.*

For the Respondent, *C. Hope, Ad. Gillies.*

Unreported in Court of Session.

[Mor. p. 8283.]

1803.

ALEXANDER IRVING, Esq., CAPTAIN ROLLO,
JAMES FRAZER, Treasurer of the Bank of
Scotland, FORREST DEWAR, and JOHN
DUNDAS, Trustees of the late Alexander
Houstoun, Banker, Edinburgh, } *Appellants;*
MRS. MARGARET ROLLO or HOUSTOUN, Wi-
dow of the said deceased ALEXANDER
HOUSTOUN, } *Respondent.*

IRVING, &c.
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House of Lords, 27th July 1803.

FEAR OR LIFERENTER—BANK DIVIDENDS—BONUS.—A truster, by his testamentary trust-deed, directed the whole 144 shares held by him in the Bank of Scotland's stock, to be transferred, immediately after his death, in his wife's name in liferent, with power to her "to receive the dividends when due, or becoming due thereon." An extraordinary dividend or bonus of £1066, applicable to this stock, was made after his death; and the question made by his trustees was, that as this was a *bonus*, arising from a division of accumulated capital, and not an ordinary dividend arising from profits; and as, by the trust deed, this capital stock was assigned to them, "with the whole dividends of profits therefrom arising;" the fee of this sum fell to them, and she was only entitled to the liferent of it. Held her entitled to the whole sum, as a dividend falling due on the bank stock of her deceased husband. Reversed in the House of Lords.

The deceased Alexander Houstoun, banker in Edinburgh, conveyed his whole means, heritable and moveable, by trust deed, to trustees for behoof of his wife, the respondent, in liferent, and his nephews and nieces, share and share alike, in fee, in the following terms: "All and whole my 144 shares of the capital stock of the Bank of Scotland, with the whole dividends of profit therefrom arising, burdened with the liferent right of Mrs. Margaret Rollo, my spouse, during all the days of her life, in case she shall survive me, with power to my said spouse, in the event of her surviving me, immediately on my decease, to get the shares in the Bank of Scotland transferred in her own name in liferent, and to appoint factors from time to time, to receive and uplift the dividends when due, or becoming due thereon, and the rents, annual-rents, or profits arising from the other means and effects, both heritable and moveable, hereby disposed in trust, without the consent of my said trustees, whose entry to the management of the funds disposed to them in trust was postpon-

1803. "ed till her decease." A posterior clause, after constituting the trustees assignees to the heritable subjects, it is added
 IRVING, &c. "And in and to the dividends of profit arising from his share
 v. "in the Bank of Scotland, *that may fall due and be payable*
 HOUSTOUN. "after the decease of the longest liver of him and his sa-
 "spouse."

Dec. 1794. On Mr. Houstoun's death, the trustees accepted of the trust; and the trust-deed being laid before the directors of

Mar. 4, 1795. the bank, the following transfer of the bank stock was effected: "I do assign and transfer unto the above mentioned Alexander Irving, Robert Rollo, James Frazer, Forrester Dewar, and John Dundas, or their quorum, trustees of the above Alexander Houstoun deceased, in fee, and to the above Mrs. Margaret Rollo *alias* Houstoun, his widow, in liferent, for her liferent use only, 144,000 pounds Scots old stock, together with 96,000 pounds Scots of the said new or additional stock subscribed for by him, corresponding thereto, being the said Alexander Houstoun his whole interest in the stock of the Governor and Company of the Bank of Scotland, with all the dividends and profits that shall be ordered thereupon."

This transfer was accepted of by Mrs. Houstoun's factor, and she received payment of the *ordinary* dividends falling due on the stock.

In consequence of an *addition* made to the *capital* of the Bank of Scotland recently before his death, he had become subscriber of a number of shares of the additional stock, which was paid for by instalments or calls, of which a large proportion was due at Mr. Houstoun's death, or became due soon thereafter.

There was this clause in the trust-deed, which entitled the trustees, during his wife's life, to uplift and apply any sum that may be necessary to pay his just and lawful debts, "and also to raise and uplift from my personal funds such sum or sums of money as from time to time may be necessary to pay up the calls that may be made by the Bank of Scotland, in consequence of the increase of the capital of the said bank allowed to the present proprietors to be subscribed for."

There was other stock in the 3 per cent. consols which might have been sold to pay off these arrears of calls, but these being at the time very low in the market, it was arranged with Mrs. Houstoun, that these calls should just remain due as a debt to the bank, the bank charging interest therefor.

Of this date, the bank declared an *extraordinary* dividend or bonus, in the following terms:—"That an extraordinary dividend or bonus be given to proprietors holding stock upon the 1st June next,"—"and that a sum equal to the bonus, to be ascertained as above, falling to such proprietors as are in arrear to the bank, on their stock account, shall be applied towards the extinction of the arrear due by such proprietor, and that at the same time the bonus is given and executed."

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Mar. 26, 1799.

In consequence of the arrears of calls for the additional stock being still unpaid, the bank, in terms of this order, retained the bonus, or dividend, as offering to the stock conveyed in liferent to the respondent: Whereupon she brought the present action against the appellants for payment of £1066 as the amount thereof. In defence, the appellants stated that the dividend was not an ordinary dividend, but an extraordinary dividend, and was consequently not to be viewed as the same with ordinary dividends that are paid on bank shares, because it was not made from profits accruing on the said capital of the bank, during the year previous to its being ordered, but arose from the surplus profits above the ordinary dividends, accumulated for a number of years previous to Mr. Houstoun's death. The respondent therefore could only claim the liferent of the £1066, the capital of that sum belonging to the trustees, they going to increase the value of their shares previous to Mr. Houstoun's death.

At first the Court, 23d June 1801, sustained the defences, "to the extent of such part of the extraordinary dividend in question as may have arisen from the undivided profits of the stock during Mr. Houstoun's life, and remit to the Lord Ordinary to proceed accordingly;" but, on reclaiming petition for both parties, and also answers, the Court pronounced this interlocutor:—

"Alter their interlocutor reclaimed against: Find the Dec. 1, 1801. pursuer (respondent), in terms of her husband's settlement libelled on, entitled to the *extraordinary* dividend declared by the Court of Proprietors of the Bank of Scotland on the 26th of March 1799: Find the defenders liable in payment thereof to the pursuer, in terms of the conclusions of the libel, and decern."* The appellants presented a bill of suspension of this decree, which was refused.

Feb. 12, 1802.

* Opinions of the Judges.

June 23d, 1801.

LORD PRESIDENT CAMPBELL said, "This is a question about the

1803. Against these interlocutors the present appeal was brought
to the House of Lords.
IRVING, &c. *Pleaded for the Appellants.*—The testator, Mr. Houstoun,
v. by his trust, conveyed to the appellants "All and whole
HOUSTOUN.

extraordinary dividend of bank stock ; and, Whether it belongs to the liferenter or the *fiar* ? In my opinion, those undivided profits lying in the hands of the bank, make in reality a part of the capital of such partner's private fortune at his death, and, when paid up, so as to yield a yearly interest or profit,—this, and not the capital, seem now to be what the liferentrix had a right to."

LORD HERMAND.—"In my opinion, it is not stock but dividend."

LORD ARMADALE.—"I am of the same opinion."

LORD MEADOWBANK.—"I am of the same opinion."

LORD GLENLEE.—"I differ ; and I am of the contrary opinion."

LORD JUSTICE CLERK.—"I am also of the contrary opinion."

LORD BALMUTO.—"I am also of the contrary opinion."

LORD POLKEMMET.—"The liferentrix is entitled only to the ordinary fruits ; as exemplified in woodcuttings and grassums."

LORD BANNATYNE.—"It is profit, and every thing is so that does not diminish the capital."

LORD CRAIG.—"It is literally a dividend of profits, and the widow or liferentrix has right to it."

1st December 1801.

LORD PRESIDENT CAMPBELL said,—"If the fact be as stated in p. 12 and 13 of the petition, the liferentrix seems entitled to the whole extraordinary dividend in question, as made up entirely of profits accruing in her own lifetime. The answers made to this on the other side are not satisfactory. If a moderate sum is left to answer bankruptcies, or other such contingencies, it may be doubted if the directors are entitled to withhold from a liferentrix one shilling of the yearly profits. Can they increase or diminish her life-rent at pleasure ? When her husband died, she might have insisted that an inventory or state should be made of her husband's whole fortune, of whatever kind then belonging to him, and to have obtained a decree of declarator, finding that the whole annual produce thereafter accruing upon it, belonged to her during her life. If the directors of the bank were entitled to retain any part of these profits for the purpose of a guarantee, or for any purpose, they retained it for her and not for the *fiar* ; and if, in place of retaining, they chose to pay it up, whether as an ordinary or an extraordinary dividend, it would only belong to her ; for they had no right to convert interest or profit into capital, to her prejudice. Neither have they any title or interest to determine matters between *fiar* and liferenter. Indeed, it may be doubted whether the directors of both banks are not exceeding their powers, in laying such immense sums of undivided profits, far beyond what is necessary to answer contingencies.

" my 144 shares of the capital stock of the Bank of Scotland, with the whole dividends or profits therefrom arising," burdened " with the liferent right of Mrs. Margaret Rollo *alias* Houstoun," his wife. Under this destination, the appellants admit that she is entitled to the ordinary dividends that may periodically be paid upon these shares: but neither from the *words* of the will, nor from any thing that can be gathered of the testator's intention, can she claim, or be entitled to any bonus or extraordinary dividend, being in its nature totally distinct from the stated half yearly dividends which constitute her liferent. From the face of the deed, the intention is clear to convey no more. He gives to the trustees (the appellants) the whole "*dividends*" or profit on his bank stock," burdened with the life estate to the respondent, of the dividends when due, or become due thereon. Thus, then, the half yearly or ordinary dividends are given to the respondent in liferent, and these are all that she can claim. While to the trustees the dividends of profits are given, meaning thereby the accumulated profits out of which the bonus now in question was paid; and this, upon the obvious principle, that an extraordinary bonus is itself a part of a separate capital of extra profits or savings, made by the directors, set apart to answer any extraordinary loss or contingency, so as to prevent the necessity of encroaching upon the chartered capital. This additional capital of itself yielding an annual profit; and the respondent is entitled to the liferent of it, but no more.

Pleaded for the Respondent.—By the trust-deed in question, it clearly appears that all the dividends on 144 shares of bank-stock, of whatever description whatsoever, are conveyed to the respondent—the capital of these alone being reserved for those appointed to take the beneficial interest.

They cannot, without an act of Parliament, add to their capital; and the constitution of the banking seems to give no authority for withholding the due share of profits belonging to any individual without his own consent. The very question which occurs here, shows how improper it is to do it, for, according to the argument maintained by the trustees, they might starve her, by dividing nothing at all, or by merely dividing a trifle. There is nothing inextricable in it, for the question is, whether the £91,000 of clear profits is thus to be divided?"

LORD HERMAND.—" I am for altering."

LORD MEADOWBANK.—" I am for altering. It is just an additional dividend, not an accretion to capital."

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1803. The deceased's intention in this respect is every where manifest. He directs the whole 144 shares to be transferred, immediately after his death, in her name in liferent, with power to uplift and receive all the dividends falling due thereon and the trustees are to have no power therewith until after her death. Had the trustees, therefore, acted as they ought to have done, paid off the arrears of calls due to the bank she would have received payment of this extraordinary dividend as a matter of course. By the trust-deed, the trustees were not entitled to receive any part of the dividend. Their participation therein, as trustees, was only to commence after her death; and therefore it was difficult to see on what ground they could claim these in the face of the express terms of the deed. He uses the term dividends of profits. This term included both ordinary and extraordinary dividends. The truster knew well the practice in his bank, of accumulating a part of the profits as a reserve fund. During his experience, he knew well that these were distributed under the name of extraordinary dividends. As the extraordinary dividend in question arose from profits, and became due after the existence of the respondent's right, and while the trustees were expressly prohibited from interfering with the profits of the bank shares, she was entitled to decree for the amount. In point of fact, and in the nature of the thing, there is no difference between an ordinary and extraordinary dividend. Both arise from the same source, both being profits of stock; and, as liferenter, she is entitled to the whole profits of that stock, without distinction.

After hearing counsel,

17th December 1802.

THE LORD CHANCELLOR (ELDON) said:—

“ MY LORDS,

“ This is a case of very great importance, whether it be considered in reference to its own circumstances, or is to be decided solely on its general principles. I have not yet perceived any ground on which to distinguish this from the cases on a similar subject which have been decided in this country.

“ In a case which, in 1799, came before Lord Rosslyn, then Lord Chancellor, the question was considered, Whether an extraordinary dividend, or bonus as it is termed, made by the Bank of England, should go to the tenant for life, or the person in remainder. And, under all circumstances, it was decreed, that it should go to the latter, as being to be considered a part of the testator's capital, acquired by

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iv., p. 800.

the testator himself. In the case now before your Lordships, it appears that a considerable part of the money in dispute was gained by the bank before the death of the testator.

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"In the case of Brander before alluded to, though the arguments and authorities there put do not seem to have much analogy with the question, yet it is considered as a case of great authority; because the Lord Chancellor says, that he had often considered the question, and the result of his opinion was, that the *bonus* belonged to the person in remainder. It does not, however, depend upon this case alone; but it has been taken as a rule of conduct ever since in very numerous instances. I have made many orders of a similar import in the Court of Chancery, proceeding upon this as an established rule.

"It is impossible not to consider what has been thus done as of great weight. These orders, so made, might have been reviewed in every instance; and thus the original case might have been again discussed and reviewed by the Lord Chancellor in the due course of being brought before your Lordships by appeal. But as nothing of the kind has been done, this shows the concurrent opinion of the bar and of the public, that *that* case was rightly decided.

"But still that case does not preclude your Lordships from entering into a consideration of the principle of those cases, if it appear in the present case, coming as it does by appeal from the Courts in Scotland, that such principle has not been recognized by the law of Scotland. The ground of the decision in the present case does not distinctly appear, and the parties are not agreed in their admissions at the bar upon this point. If it proceeded upon the general principle, your Lordships have now imposed upon you a duty that cannot be fulfilled without great consideration, namely, to pronounce which of the two learned Courts has decided the question right?

"But if the Court below decided this case on any special circumstances, much more if they expressed a concurrence with the doctrine laid down in the case of Brander v. Brander, your deliberation as to the judgment proper to be pronounced in this case would be much facilitated. This would reduce the question merely to an interpretation of Mr. Houston's will; as, if the Court had said, in a case when a testator gives an estate for life in his property to A., and the remainder in fee to B., then we should agree with the case of Brander v. Brander, but we have given this *bonus* to the tenant for life, upon the special bequests of the will.

"Any of your Lordships, looking at the questions which have been made upon this subject, and the nature of the bonus, might infuse or insert into your will, what would not only authorise, but require the Courts of law to say, that the tenant for life should have it. Then, in such a case, the question would be, whether or not the will included the extraordinary dividend or bonus, and these parties

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must undoubtedly make out that it was given to them by the specialities of the will.

"If the matter now before you depended solely on a construction of the will, I should say that the decision need not be delayed to a later day than Monday next. But as the sentiments of the Court below are unknown upon the point of law, I think it is proper that we should learn whether the case was decided upon general principles, or on the specialities of the case.

"It would certainly strengthen the decision in the case of Brander, if the Court of Session coincided with it. But if they dissented from it, your Lordships must decide between them.

"If the information wanted can be given us before the Christmas recess, I shall be glad that the case be decided before the House rises. In hopes that this information may be obtained, I move that the farther consideration of this case be put off till Thursday next."

Ordered accordingly.

On 27th July 1803, case resumed.

THE LORD CHANCELLOR (ELDON) said:—

"My Lords,

"This case is of considerable importance to the public. It arises out of the following circumstances:

"On the 28th June 1794, Alexander Houstoun executed a trust-disposition of all his property to certain gentlemen, being the appellants in this cause. This deed contains a clause, on which the present question rests, in these words:—'And most particularly as to my personal estate, I hereby assign, dispoise, convey and make over to my trustees above mentioned, all and whole my 144 shares of the capital stock of the Bank of Scotland,' &c. (Here his Lordship read that part of the deed which is contained in the first and second pages of the appellant's case).

"The appellants, in their printed cases, and in the argument at the bar, laid some stress on this, that Mr. Houstoun conveyed to his trustees his 144 shares of stock, with the whole 'dividends of profit therefrom arising, and that Mrs. Houstoun was 'to receive and uplift the dividends when due, or becoming due, thereon.' From this difference of expression, it was argued that Mr. Houstoun meant to give his wife no more than the ordinary and accustomed dividends on his stock, whereas the trustees were to receive every thing that the bank might pay thereon. The respondent, however, in her appeal case, has printed a clause from the deed, which shows that it will not bear the inference put upon it by the appellants. Mr. Houstoun, after constituting his trustees assignees to his heritable subjects, adds, 'and in and to the dividends of profits arising from my shares in the Bank of Scotland that may fall due and be payable after the decease of the longest liver of him and his said

pourse.' Here he uses the same words as to Mrs. Houstoun's life-estate, which the appellants stated as inferring the conveyance of a greater estate and interest to the trustees. The case therefore comes to be purely that of a tenant for life, and of those interested in remainder in the stock in question; and the point for our decision is, which of these parties should be entitled to an extraordinary dividend, declared by the Bank of Scotland, which is known in both countries by the name of a *bonus*.

"In consequence of an addition to the stock of the Bank of Scotland, Mr. Houstoun, recently before his death, had subscribed for a certain number of the shares of that stock; and at his death a considerable part of the subscriptions, which had been payable by instalments, was unpaid. The trustees might have sold some of his stock vested in the 3 per cent. consols, to have paid the future instalments as they fell due, but the price of that stock being low, the instalments were allowed to run in arrear, for which interest was paid to the bank. This was done with Mrs. Houstoun's concurrence, and, in its operation, it was prejudicial neither to the liferentrix nor the fiar.

"In 1799, the Bank of Scotland declared a bonus or extraordinary dividend in the following words. (Here his Lordship read the words.) The bank detained this bonus to answer the instalments not then paid up of the stock which had been subscribed for; but the position remains the same, between the present parties, as if the instalments had been regularly paid up when they became due.

"Mrs. Houstoun then brought her action against the appellants. (Here his Lordship read from the printed cases, the conclusions of the summons, and the appellants' defences.) The Court, by its first interlocutor (23d June 1801,) 'Sustained the defences, to the extent of such part of the extraordinary dividend in question, as may have arisen from the undivided profits of the stock, during Mr. Houstoun's life.' The principle here was, that an account was to be taken of the extraordinary profits which had arisen before Mr. Houstoun's death, and of those which had arisen afterwards, and that the result of the two accounts would form a rule for settling this question.

"Both parties reclaimed against this judgment, and it was afterwards altered by the Court, who found the liferentrix entitled to the extraordinary dividend. The decree was suspended, but the bill being refused, the whole matter was brought here by appeal.

"Here I may take leave to mention, that a similar question had occurred in this country in the Court of Chancery, before a noble and learned Lord, now present, Brander v. Brander, in 1799, and I Lord Rosslyn. I see no reason why there should be a difference in the decisions in the two countries in regard to bank stock.

"In that case, the noble and learned person stated that he 'had

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' often considered the question, and it seemed to him, in all the different ways he could turn it, that there was no way to be taken but to consider it as an accretion to the capital, and the tenants for life would have the benefit of the dividend.' This was a most equitable decision. A similar decision had also been made by Lord Alvanley when sitting in a Court of equity. These have been followed in all cases where bonuses have been divided in the Court of Chancery among factors and wards, the number of which cases is very great indeed; in all these, such bonuses have been held an accretion to the capital.

" These cases, particularly that of Brander, was pressed on the Court of Session as authority upon this point. I think the Court did not act upon it as such, for this reason, because they only saw it as stated in the printed report, and they entertained doubts if the bonuses had not, in that case, been declared in the testator's lifetime. If it had been so declared, there could not have been a shadow of doubt upon the question.

" I have provided myself with the original papers in that case of Brander, the facts in which were, that the will was made in 1735—the testator died in 1787—the bonus was declared in 1797—and the decree was pronounced in 1798. (Here his Lordship read extracts from these original papers).

" The question for the determination of your Lordships, therefore, is, Whether you will *affirm* the judgment in the present appeal, and thereby reverse all that has been done in this country, or reverse that judgment, and thereby confirm these decisions? I have the less uneasiness in stating my opinion, that it will be proper to reverse this decree, as I think the Court of Session would have decided otherwise, if they had known the true state of the case in Brander v. Brander. The noble and learned Lord who pronounced that decision, and Lord Alvanley, both concur in the same opinion.

" It is impossible to deny that great difficulties attend this matter; the proper question is, on which side the fewest difficulties lie? And, added to this, in a case of *res non integra*, I think your Lordships would scarcely reverse the very numerous decisions pronounced in this country, except upon strong grounds.

Alluding to
 Mr. Astlett's
 fraud on the
 Bank.

" The Bank of England, to which the Bank of Scotland is similar in this respect, has a capital limited by Parliament to a certain amount. This limitation, if strictly adhered to, would have this inconvenience attached to it, that circumstances (of which we have seen recently a very strong instance) might occur, to oblige them to reduce their ordinary dividends. Therefore it is, that these companies have what is termed their floating capital, which they lay out in the purchase of exchequer and navy bills, in discounts, and in every species of property that can be turned into cash at pleasure. Every person who buys bank stock is aware of this; and if he gives the life interest of his estate to any one, it can scarcely be his mean-

that the liferenter should run away with a bonus that may have accumulated on the floating capital for half a century.

In point of principle, the first interlocutor in this case seems to be founded than their ultimate decision. On what ground of equity it be contended, that the liferenter shall have any part of Mr. Houston's capital accumulated during his life? If £500 had been accumulated at Mr. Houston's death, another £500 at the period declaring the extraordinary dividend, and a *bonus* of £500 then, it would be very difficult to say, that such bonus should not be applied to the sum first due.

But a question of this sort cannot be considered in this narrow view; what might be decided in the case of an ordinary success in Scotland, in regard to cut wood, or of underwood cut in one, for a good many years, will not apply here. Were you to take account of the profits on the floating capital of the bank in this case, it would lead into a discussion of that matter from the beginning, and with all the other proprietors of stock. It is not a question of what Mrs. Houston would be entitled to alone, but of 500 persons, who having been so dealt with in similar circumstances, were entitled to. It is well known that the bank lays out of its floating capital in building and various other improvements, which so far diminish its floating capital. If the tenant for life were vested with the profits on this floating capital, his interest in such buildings would pass to his representatives in this country, and at the distance of 150 years, might call upon the bank for a large expense. The oldest tenant for life would have had a right to be satisfied.

It will be seen that these would have led to inconveniences which would have been intolerable. Therefore it was that the bonus was given to the person interested in the capital. Though I am aware that there is a difficulty in the principle of the English decision, it is impossible not to say, that the decisions in both countries ought to be the same. I therefore think your Lordships will be right in reversing the present interlocutor."

EARL OF ROSSLYN.—(He spoke in so low a tone of voice that it was only at intervals that he was heard).

"I entirely agree with the sentiments which have been delivered by the Lord Chancellor. When I first came to consider the case of *Anderson v. Brander*, I thought it would be necessary to learn what part of the *bonus* had accumulated before the testator's death, and what part since that period, to do justice between the claimants. The bank were very much alarmed when I hinted any intention of doing so. Upon considering this matter maturely in all its consequences, the judgment was pronounced in that case, holding the *bonus* to be an accretion to the capital."

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It was ordered and adjudged that the interlocutors complained of in the said appeal be reversed ; and find that the extraordinary dividend or *bonus* given by the Bank of Scotland to the proprietors of the stock of the late Alexander Houstoun, deceased, ought not to be considered as belonging to Mrs. Houstoun, as the liferenter of the stock of the Bank of Scotland, belonging to the said late Alexander Houstoun, but that the same ought to be considered as belonging to all the persons interested in the said stock of the said late Alexander Houstoun ; and that Mrs. Houstoun is therefore entitled only to the interest thereof for her life : And it is further ordered that the said cause be remitted back to the Court of Session in Scotland to proceed accordingly.

For Appellants, *Wm. Alexander, J. Abercromby.*
For Respondent, *Wm. Adam, Samuel Romilly.*

JOHN ANDERSON of Windygoull, Esq., *Appellant;*
Messrs. WILLIAM and JOHN CADELL, Mer- }
chants in Cockenzie, - - - } *Respondents.*

House of Lords, 27th July 1803.

PRESCRIPTION—PROPERTY—COAL—NOVODAMUS—SIGNATURE.—

This was a competition for the property of the coal, which had been disjoined from the property of the land by the superior selling the land under reservation of the coal; the superiority, with this reserved right of coal, reverted to the crown, by the forfeiture of the superior in 1715. The vassal, in 1716, obtained then a charter from the crown, under the Clan Act, in the novodamus of which, but not in the dispositive clause, the coal was mentioned. This, it was alleged, was a fraudulent interpolation. Three years thereafter, the York Buildings Company purchased the forfeited estates from the Government Commissioners, and obtained a charter, expressly conveying the coal of these lands; and, in 1779, the respondents purchased their right at a judicial sale, the decree conveying to them expressly the coal. The former (vassal) had a charter earlier in date, expressly mentioning the coal, upon which the long prescription had run, but there was no possession. The latter (purchasers) had also charter, expressly conveying the coal, fortified by prescriptive possession and working of the coal. Held the latter to have right to the coal.

This was an action of declarator brought at the instance

the respondents against the appellant, concluding to have found and declared that they, as purchasers of the lots of land, at the judicial sale of the estates belonging to the York Buildings Company, *had right to the coal* under the appellant's lands of Windygoull, which was formerly part of that barony belonging to the Earl of Winton, and forfeited the crown on the earl's attainder.

In defence to this action, it was maintained by the appellant that the coal was his property, having been expressly conveyed to his ancestor by the crown, and vested in his ancestor by infestment, three years before any part of the Winton estate had been acquired by the York Buildings Company.

It appeared from the appellant's title, that in 1668 George Earl of Winton had granted a feu charter of the lands of Windygoull, in favour of George Anderson of New-Brotherstones, the ancestor of the appellant.

By this charter, the property only was conveyed to him, superiority remaining with the family of Winton; the superior also reserved to himself, by the same charter, all coals situated in the lands so conveyed, in the following manner: "Reservatis tamen nobis hæredibus et successoribus nostris, totis et integris carbonibus et carbonariis in a totas bondas omnium terrarum aliorumque supra dispositæ quæ sub dispositione et jure script. nec hoc nostro feofamento desuper sequen. minima comprehendî declarantur; cum libero passagio in et ad dicta carbonaria," &c. The Earl of Winton was attainted of high treason on account of his accession to the rebellion of 1715; and of consequence all his estates, and those rights belonging thereto devolved on the crown by his forfeiture.

It was alleged by the appellant, that by the Clan Act all 1 Geo. I. c. 20. persons who "continued in dutiful allegiance to his Majesty, his heirs and successors, holding lands and tenements of the crown, offender who holds his lands immediately of the crown, shall be vested and seised, and are hereby ordained to hold the said lands of his Majesty, his heirs, &c. in fee and heritage for ever;" and the Court of Exchequer was ordered accordingly to "revise, compound, and pass signatures, and that without paying any composition to such vassals accordingly." Another clause in the same act provided, that if a vassal should be guilty of high treason, that his estate or property should revert to his subject superior remaining at peace with the king.

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1803. The appellant's predecessor, instead of following the fortune of his superior, remained at peace with his Majesty, and availed himself of the privilege conferred by this act; and, of this date, obtained a charter from the crown of these lands of Windygoull, with a clause of *novodamus*, in which a right to the coal is expressly mentioned. "Ad et in favorem prædict —
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1716. "Joannis Anderson hæredum ac assignatorum quorumcunque —
"totam et integram justam et æqualem dimidietatem dict —
"terrarum de Easter Windygoull cum æquali dimidietate —
"decimarum garbaliū et rectoriarum prædict. totarum terrarum ac pertinen. earum cum hujusmodi inclusis cum par —
"tibus pendiculis et pertinen. dict. æqualis dimidietatis dict —
"terrarum et decimarum supra script. una cum æquali dimidietate pratarum maresii pasturarum communitatis e —
"communis pasturæ et totarum privilegiorum et pendiculo —
"rum et pertinen. quorumcunque pertinen. ac attinen. ac —
"eadem. Et etiam totam et integram aliam justam et æqualem dimidietatem prædict. terrarum de Easter Windygoull, cum —" (as before). At the end of these descriptions there was thrown in the mention of coal, "una cum omni jure titulo interesse —
"jurisclameo proprietate possessione tam petitoria quam possessoria quæ nos vel nostri predecessores ac successores —
"vel dict. Georgius quondam comes de Winton habuimus —
"habemus seu alio quo modo habere clamare aut pretendere —
"poterimus prædict. terres carbonibus carbonariis earund. —
"vel aliaqua parte aut portione hujusmodi," &c.
- Mar. 7, 1717. Upon this charter infeftment followed, of this date. On the part of the respondents, it was stated, that about two years after this infeftment, the estate of Winton, forming a part of the forfeited estates, was bought by the York Buildings Company; and was subsequently acquired by the respondents.
- In the title then exhibited as belonging to the portion of the estate purchased by the respondents, it appeared that the barony of Tranent had always been conveyed, under reservation of the coal. In particular, in 1603, the same lands had been conveyed to Alexander Seton "Salvo tamen et reservando nobis hæredibus et successoribus nostris, carbonibus cum carbonariis, sub prædictis terris quibuscunque." In consequence of a contract, the lands again came into the possession of the Winton family, who again granted a charter of *novodamus* in favour of one Turnbull and his wife, containing a reservation of the coal.
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1614. This property again reverted to the superior; and was in

1663 conveyed by the Earl of Winton to his second son, William Seton, with an express reservation of the coal, as before.

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It again reverted to the superior; and in 1668 the earl granted a feu-charter thereof in favour of George Anderson, the appellant's ancestor, to him and his spouse in liferent, and to John Anderson, his son, in fee, conveying these lands with the following express clause of reservation of the coal: "Reservatis tamen nobis hæredibus et successoribus nostris, totis et integris *carbonibus* et carbonariis infra totas bondas omnium terrarum aliorumque supra disposit quæ sub dispositione et jure supra script. nec hoc nostro infeofamento de super sequen. minime comprehendi declarantur, cum libero passagio in et ad dicta carbonaria, cum libertate effodiendi et effringendi solum et fundum totarum et integrarum terrarum prædict. pro effodiendis lie sinks, levels, aliisque necessariis pro lucrandis carbonibus, et pro exponendis hujusmodi carbonibus super solam ullius partis dict. terrarum ubi hujusmodi pro tempora lucrari contigerint," &c. Then followed a clause about the sinking of shafts and the paying of surfage damage. On this charter infestment followed, of this date; and under these titles Mar. 5, 1688. the appellant's family had alone possessed the property of Vindygoull down to the year 1715, at which time, as before mentioned, the family title and estate of Winton was forfeited to the crown, and the estate vested in the Government Commissioners, who sold it to the York Buildings Company.

The act of Parliament already alluded to, authorized vassals who held of rebel superiors to enter with the crown. And was in virtue of an entry thus effected that the charter 716, above alluded to, was obtained. But the respondents maintained that this act was never intended to alter or improve, or benefit the estates and patrimonial interests of the vassal in any respect, but only to enable them to obtain the benefit of an entry.

The signature and warrant for this charter to John Anderson's ancestor, contained no mention about coal in the dispositive clause, but disposed the lands exactly in terms of the original feu right of the family, "as the same has been formerly possessed by the former feuars thereof, and tenants of the same past memory of man." And John Anderson was infested in virtue of the charter which passed on this signature; and, of

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 Mar. 27, 1752. this date, 1752, he conveyed the lands by general disposition, to his son Richard, who took infeftment on the precept in this disposition, and continued base infeft until his death. The appellant, John Anderson, succeeded his father Richard, and expeded a general service as heir to his father, in order to carry right to the procuratory of resignation in the disposition granted by his grandfather in 1752; whereby, of this date, he obtained a crown charter of resignation, in which the words *carbonibus carbonariis* are introduced. On this charter the appellant was infeft.
- Dec. 10, 1786. Upon the sale of the barony of Tranent by the Commissioners of the Crown (16th October 1719) to the York Buildings Company, upon their disposition, a crown charter was obtained, in which his Majesty conveyed the baronies, &c. *cum carbonibus carbonariis*, &c. Within this barony Windygoull was included. And at the judicial sale of the York Building Company's estates, the following words appeared in the decree of sale in favour of the respondents, with reference to the second lot, the barony of Tranent,
- Jan. 25, 1787. Feb. 15, 1779. " Together with the whole salt pans within the boundaries " of this lot; and not only the coal contained in this, but " also the coal below the houses and yards of the village of " Tranent, and below the whole feued lands in the barony " of Tranent, with the whole rights and benefits of working " the said coal competent to the York Buildings Company, " with the whole gins, waggons, utensils, and machinery " presently employed in the coal and salt works of the said " whole estate, so far as the Company have right thereto." On this decree of sale the respondents expeded a crown charter in exactly similar terms; and, conceiving that their right upon the above titles, fortified by prescriptive possession, was indisputable, they brought the present action to have it found that they had right to the coal within the property of " Easter and Wester Windygoull," as mentioned in the titles of the York Buildings Company.
- Mar. 11, 1801. The Court pronounced this interlocutor: " Upon report " of Lord Craig, and having advised the informations for the " different parties in the cause, with the minutes given, &c. " the Lords find that the pursuers (respondents) have right " to the coal in question; ordain the defenders to cede the " possession thereof; prohibit and discharge them from " working the same in time coming, and decern and declare

accordingly, in terms of these conclusions of the libel."* 1803.
 on reclaiming petition the Court adhered.

Against these interlocutors the present appeal was
 brought to the House of Lords. ANDERSON
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Pleaded for the Appellant.—By the act of attainder, there May 28, 1801.
 was vested in the crown every right in the lands of Windy-
 cull which had belonged to the former superior, the Earl
 of Winton, who had reserved to himself the property of the
 coal, and held the same as an accessory of the superiority
 of the lands, from which it was never disjoined. By the
 act 1 Geo. I. the appellant's ancestor became entitled to
 obtain a charter from the crown, as his immediate superior ;
 and, without entering into the question whether the officers
 of the crown, in granting that charter, might not have dis-
 joined the coal from the superiority, and retained it as a
 separate subject, it is plain, in point of fact, that no such
 intention was entertained or attempted to be carried into
 execution, but, on the contrary, that the officers of the
 crown had then resolved, agreeably to the spirit of the act
 of Parliament, to convey the coal to the appellant's ancestor
 as an accessory or appendage of the superiority. Accord-
 ingly this crown charter was granted in 1716, by which,
 twelve years before the York Buildings Company had acquir-
 ed the rest of the estate of Winton, the lands of Windy-
 cull were disjoined and disannexed from the barony, and
 were granted to the appellant's ancestors expressly *cum*

* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said,—“ This is a question about the
 right of coal claimed by both parties. It is of importance to know
 whether there was a feu-duty payable out of these lands to the family of
 Winton, and who receives it now. The defender, in my opinion,
 cannot plead the positive prescription on the charter 1752 (1716), as
 the possession seems to be against him. The coal of this barony has
 uniformly been reserved as a separate right belonging to the supe-
 rior. See the case of Sir J. and Sir R. Anstruther, 19th Feb. 1792, *Vide ante*, vol.
 determined in the House of Lords 19th May 1796 ; see also the *iii.* p. 483.
 the case of *Morris of Hillhouse v. Officers of the Prince of Wales.*

LORD HERMAND.—“ The right is now in the vassal, and the Clan
 act has fortified that right.”

LORD JUSTICE CLERK.—“ This is not the meaning of the Clan
 act. Besides, to enter upon possession by the Clan act required
 certain forms, which have not been gone into here.”

Lord President Campbell's Session Papers, vol. 102.

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carbonibus carbonariis. Upon that charter infeftment followed in the year 1717, and, from that time downwards, the progress to these lands cum carbonibus et carbonariis is regular and uninterrupted down to the present moment, where they stand in the appellant. It seems therefore impossible to dispute that there is not only a solid fendal title to the coal of these lands in the person of the appellant, but that this title is fortified by a prescription of more than forty years. No doubt, it is objected that the clause cum carbonibus et carbonariis is not contained in the dispositive clause of the charter 1716, but only in the novodamus, and in crown grants it is the dispositive clause alone which is held to convey the thing to the vassal. But a clause of novodamus is commonly inserted in charters of resignation for the purpose of remedying defects, real or supposed, in the former title of the vassal; and it has been uniformly held, that every express grant contained in such clause is effectual, even although the subject conveyed did not formerly belong to the vassal, and although no mention of it is made in the dispositive clause. It is so laid down by Erskine, B. ii. tit. 3, § 23. And the cases referred to by Erskine support this doctrine most completely, namely, that an express grant in the clause of novodamus is sufficient to convey to the vassal a subject which he had not resigned, and to which he had no previous right.

Pleaded for the Respondents.—In consequence of the reservation in the charters from the Winton family, the separation of the estate of coal from that of land, and the investment of the former in the person of the superior, were complete, and had continued so for above a century prior to the forfeiture in 1715, at which time the superiority and coal passed into the person of his Majesty. It was therefore only by an express grant from the crown that any person could establish a right to the coal. The appellant's charter in 1716 proceeded upon the Clan act, which was made for the sole purpose of changing the tenure of loyal vassals from their rebel superiors to the crown, and indicates no intention to improve the situation of the vassal in any other respect, much less to surrender any profitable interest of the crown. This intention is further illustrated by the act 1 Geo. I. c. 50, made for the express purpose of prohibiting and declaring ineffectual and void all gratuitous alienations by the crown, of the interests it had acquired, or might acquire, through these forfeitures, whether the same should happen either through mistake or design, and which of

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If would have been sufficient to render void an express grant of coal to the appellant's ancestor. But the signature or warrant for the charter, in this case, contains within itself the strongest presumptions that no conveyance of coal was intended by the crown. The lands are conveyed *as possessed by the former feuurs*; none of whom had right to mine coal. There is no mention of coal in the dispositive clause, the only one that is held to convey any thing in crown grants. And the clause of novodamus cannot in any degree improve the situation of the vassal, as not proceeding on his Majesty's sign manual. It was merely inserted in consequence of the general provision of the statute, as a mere formal foundation of the vassal's new tenure under the crown, and as a discharge of all arrears of feu-duty or other casualty due to the superior. Besides, it is obvious on inspection of the signature, that the introduction of words conveying coal is a fraudulent interpolation after it had been settled in Exchequer. The words "*cum carbonibus et carbonariis*" appear to be interlined, and are attested by the revising Baron, as the marginal notes on the signature appear to be. No doubt the appellant says that all these irregularities are wiped off by the forty years' prescription. But this is no answer to the effect the respondent pleads these irregularities. He only refers to them as clear indications that the crown never, in this grant, intended to convey the coal, and as affording proof positive that no such intention of parting with the coal existed. And, further, the respondents apprehend that, in a question of competition of heritable subject, where the titles of both parties are beyond the years of prescription, and where possession has varied betwixt the two, it is competent for a judge to consider the presumptions afforded by the titles themselves, and to give the preference to those who appear to him the most exceptionable. How much more then must these presumptions weigh, in the present case, where the possession has been uniform on the respondents' part, and where there is not a vestige of possession on the part of the appellant upon which he can plead prescription.

After hearing counsel, it was
Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellant, *C. Hope, Ad. Gillies.*

For the Respondents, *Wm. Adam, James Abercromby.*

Unreported in the Court of Session.

1803. JOHN M'LEAN, Merchant, Leith, . . . *Appellant*;
 WILLIAM BETHUNE of Blebo, and Others, his } *Respondent*.
 Creditors,
 M'LEAN
 v.
 BETHUNE.
 House of Lords, 4th August 1803.

Cessio—FRAUD—Circumstances in which the Court of Session refused to grant an insolvent person the benefit of the *cessio*; but reversed in the House of Lords.

This was an application for a *cessio bonorum* by a party insolvent, and who had assigned his whole means and estate to a trustee, for behoof of his creditors.

He had thereafter retired to the sanctuary; and had there been imprisoned in the abbey jail for a debt contracted within the precincts of the sanctuary; and thereafter he was incarcerated in the Canongate jail; whereupon he sued out the present process. The creditors in part appeared and opposed the *cessio*—the greater part not appearing. They averred, that during a certain period that the appellant was entrusted with the management of his affairs and funds, by sufferance and arrangement with his creditors, the funds had suffered an unaccountable diminution; that this discrepancy of funds could not arise from innocent misfortune but from fraud; and, therefore, that, as a fraudulent bankrupt, he was not entitled to the benefit of *cessio*. The Court remitted to an

June 30, 1801. accountant “to report upon the trustee’s proceedings, and
 “as to what progress he has made in the execution of his
 “trust since the last report was exhibited by him, whether
 “he has been able to recover any part of the bankrupt
 “effects, and to what extent, or in whose hands they are
 “situated? What preferences are claimed on by particular
 “creditors, and how and at what period these preferences
 “were obtained? And, in particular, to explain, as far as he
 “can do from the books, or other materials before him,
 “whether John M’Lean, during the interval between Janu-
 “ary 1794 and March 1796, while he was entrusted with
 “the management of his own affairs, acted in a fair and re-
 “gular manner towards his creditors, and what were the
 “causes of the great deficiency which appeared at the lat-
 “ter period?”

There was no allegation that the appellant did not keep regular books. It was only objected, that, in the books he kept, he ought, in addition, to have kept a waste book. The accountant, in reporting to the Court, did not specify any circumstances of unfair dealing. Yet the Court of Session pronounced this interlocutor:—“The Lords having resumed
 “consideration of this petition, and advised the same,

Feb. 13, 1802.

with the condescendence and last report of Mr. Russel, and heard the counsel for the parties thereon, they refuse the petition and condescendence, and adhere to their former interlocutors, and decern."

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—That the charges of fraud against the appellant by the respondents, whether stated generally or specially, have been either insinuated or stated, to make up for the want of any real objections to his right to the benefit of the cessio, and, without any evidence, or shadow of evidence, of this fraud being adduced. It is clear, that such unsupported charges, insinuations, and mistatements, cannot prevent him from getting his cessio. He has done every thing a person in his situation is expected to do. He has kept regular books, and these are in the hands of his trustee for his creditors. He has surrendered every thing, and concealed nothing. It is true, to entitle him to the benefit of the cessio, he must be able to adduce the proper and reasonable evidence of the cause of these transactions which have occasioned his insolvency. This is abundantly shown from his journal and ledger. Several foreign consignments to a large amount, together with an unparalleled series of mercantile failures and embarrassments are shown. And although the appellant kept no cash book, or no regular letter book, yet, that the first was supplied by the ledger, wherein there was a head appropriated for all cash transactions, and although copies of all his letters were not kept, yet the originals were in the hands of the creditors. Besides, the respondents, who allege fraud, must prove it. The onus lies on them to prove their defence, not for the appellant to prove a negative—to prove that he himself was guilty of fraud.

Pleaded for the Respondents.—The appellant is bound to prove that the bankruptcy arose from innocent misfortunes, which it was incumbent upon him to do in this action. He has not done so; and therefore the Court, although not expressly prohibited by statute from granting the benefit of a cessio, and may exercise a discretionary power, yet the practice, in such cases as the present, has always been to refuse the cessio. The books of the appellant do not afford any satisfactory information, either as to his past transactions, his misfortunes, or the present state of his affairs. From the manner in which his books have been kept, the accountant found it difficult to understand the state of his affairs,

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and this confusion was doubtless assumed to cover his fraud. But it is not necessary for the respondents objecting to prove *that* fraud. They are only bound to refer to facts in his affairs which suggest suspicion, and which require explanation. It is the appellant who must prove that his bankruptcy has arisen from innocent misfortune; and this not having been done, he is not entitled to the benefit of the cessio.

After hearing counsel,

LORD CHANCELLOR (ELDON) said,

"My Lords,

"This is a question arising out of an application for the benefit of cessio, which is a very unusual subject here, and brings up a judgment pronounced below by a very narrow majority. Five of the judges having thought him entitled to the cessio, and six judges not—

"I may refer your Lordships to Erskine's Institutes, B. iv. 3, 26, so as to show that the appellant's circumstances came under the description of persons entitled to sue for the benefit of this process.

"The appellant here was originally in Holyrood House, or Abbey. He was thereafter in the Edinburgh jail, and endured the *squalor carceris* for some years. He then applies for cessio. Part of the creditors do not oppose. But part do.

"The Act of Sederunt 1st Dec. 1685, read. When communicating with one of the law Lords on the terms of this act, we lamented to see so much looseness in the law, as it was not easy to determine whether insolvency, or misfortune, or both considerations, were necessary to be made out. The passage is not clear, whether the pursuer is to make out that his insolvency is not owing to fraud. If so, he undertakes proof of the negative—a course which, your Lordships know, is quite unusual.

"If, on the other hand, he openly makes a full disclosure, and if the creditors can distinguish no criminality, *that* will be distinct proof of this negative. The creditors must prove their allegation of fraudulency.

"By the Act of Sederunt he is bound to assign over his estate to creditors. It seems to have been taken for granted, that in a case of fraudulent practices, he could not be entitled to his cessio.

E. B. iv. tit.
iii. § 26.

"The effect of decree of cessio (reads from Erskine, § 26,) is to set the prisoner at liberty from his creditors' diligence, but having no effect as to future debts. According to this passage, a party may have the benefit of cessio if he submits to wear a dyvours habit. In a case of this sort, where a party can protect no property that he has, or may acquire, and where no protection or certificate can save *that* from the creditors, but is only a protection to his person from imprisonment for debt, some favour is due in considering the present application. Perhaps some may look at this case with too much feeling, the other with too much severity. But a party, in a judicial suit, cannot too often re-

ect that he is not to look at the condition of the parties—neither he right nor to the left—but whether the individual is in the position entitled to redress.

In my opinion, this case is quite unusual for an appeal; and, therefore, it may be worthy of inquiry how far appeals are proper in this and bankruptcy cases.*

At same time, I should have liked to have seen, in this case, the decree of cessio was refused. In such cases of practice very delicate to meddle with the judgment of the Court below. For that reason I should have wished it more explicit, because the parts of the judges' speeches are so loose (reads notes), that I cannot extract satisfaction from them. I have listened anxiously to counsel to learn why the cessio was not to be granted, but could not find it distinctly.

It would be very loose to say, that though no fraud appears, there must have been fraud done to the creditors from the state of affairs. It would be a hazardous principle to say that there is fraud, and yet, when called on to specify, you cannot discover or disclose it. In this case, I presume the contrary, 'De non apparentibus' &c. must apply.

If the Court had gone on the ground that the misfortune by which insolvency was produced, was not made out, or fraud of various kinds, specifying these, this would have been intelligible. We do not know the grounds, and therefore we must take from books of authority the directions to go by. (Reads state of case from printed cases.)

True, the question is, whether it be made out by evidence that fraud did happen by such gross inattention, fraudulent preferences, or concealments. If fraud had clearly appeared, then there would have been an end of the question. They do not say that this man had not kept his books so regularly as he ought to have done. And the result of the accountant's report is, that there is no fraud.

On the whole, I cannot see ground on which to refuse my concurrence with the minority of the Court below. I concur with the learned Lord who was here yesterday, and with Lord Thurlow, that the preponderance of evidence is in favour of granting the cessio, and that the interlocutors be therefore reversed."

ordered and adjudged that the interlocutors complained of in the appeal be reversed. And find, that the pursuer in this case is entitled to the process of *cessio bonorum*. And it is further ordered that the cause be remitted

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* This is the third case in which his Lordship had expressed doubts as to the propriety of appeals in such cases. Viz. in a Protection case—in a sequestration case,—and now in a Cessio. The recent Bankrupt Acts do not alter this; and the act 6 and 7 Wm. IV. § 19, in regard to the Cessio, expressly allows an appeal.

1803. back to the Court of Session in Scotland to proceed accordingly.

INCORPORATION OF TRADES OF PERTH
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&c.

For the Appellant, *John Clerk, Thomas Thomson.*
For the Respondents, *Wm. Adam, Adam Gillies.*

Unreported in the Court of Session.

JAMES CHRISTIE, Deacon, and ROBERT KEAY, }
Boxmaster of the Incorporation of Ham- } *Appellants;*
mermen of Perth, and Others, Members }
of the Incorporation of the said Burgh, }

JAMES PROUDFOOT, Merchant, Dean of }
Guild of Perth, and Others, Members of } *Respondents.*
the Guild Council of the said Burgh of }
Perth, }

House of Lords, 6th December 1803.

BURGH—TRADES CORPORATIONS—PRIVILEGES.—The sons, and sons-in-law of the several incorporated trades of Perth, had the privilege of entering their respective corporations at lower or illusory dues. By the charters erecting the guildry corporation, the members of these several trades had a privilege also of entering the guildry, upon paying smaller dues than was exacted from strangers. The sons, and sons-in-law of the trades incorporation, imagining that they had a similar right, sought to be entered as members, on payment of the like small dues. Held that they could not claim to enter the guildry, except on paying the dues as strangers.

In the burgh of Perth, as in all Scotch burghs, the burgesses are of two descriptions,—merchant-burgesses, so called from their dealing in merchandize only; and trades-burgesses, who are engaged in mechanical employments. All the burgesses of Perth (excepting weavers and waulkers) are guild brethren, and, as such, have certain rights and privileges.

There are seven incorporations of trades, burgesses in Perth; hammermen, bakers, glovers, wrights, taylors, shoemakers, fleshers. All these incorporations have peculiar rights and privileges, and separate funds under their own management. As long as a burgess is a member of any of the trades' incorporations, he can only exercise the calling, and enjoy the peculiar privileges of that incorporation.

is another incorporation composed of merchants, or such of the guild brethren as are not members of the trades' incorporations. This is called the *Incorporation*, which also has its peculiar privileges, and its own funds under its own management. But any of the trades' incorporations might enter with the incorporation, and carry on merchandize; though, in doing so, he must relinquish his former calling.

Sons and sons-in-law of the members of the guildry incorporation had the privilege of entering with that incorporation, on payment of certain small fees; and, in like manner, the sons and sons-in-law of the members of the trades' incorporations, had the right of entering, when duly admitted, each with the trades' incorporation to which his father or father-in-law, belonged; and as the members of the trades' incorporations had right to enter with the guildry incorporation, so, in this case, it was contended that their sons and sons-in-law, had the same right of entering with the guildry incorporation that belonged to the sons, and sons-in-law, of members of that incorporation.

When the son, or son-in-law, of a trades' burgess entered as a merchant, or member of the guildry incorporation, he paid the following dues, viz. 4 pounds Scots, of burgess dues, to the town and the guildry, equally; ten merks to the guild; ten merks for the merchants' upset; and Sterling in name of football, with 6s. as the dues of the Court.

When he entered as a trades' burgess, or member of the trades' incorporation, he paid 4 pounds Scots of burgess dues, to the town and guildry, equally; ten merks to the guild; 4 pounds Scots for the trades' upset; and the fees of Court.

1791 John Wright, who was married to a daughter of James Imrie, baker, a trades-burgess of the burgh of Perth, desired to be admitted as a merchant burgess in the guildry incorporation, in right of his wife, for the entry money and payable by others in similar situations. This application was rejected, on the ground that the sons-in-law of trades' burgesses have no right, such as the trades' burgesses themselves had, of entering with the guildry on paying smaller fees, but must enter the guildry as strangers, paying the same burgh fees as strangers did.

On this the appellants brought the present action of declarator, to vindicate their ancient privileges, and to have

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1803. that right declared. And the Court, of this date, pronounced this interlocutor: "Upon report of Lord Cullen, and
 INCORPORATION OF THE "having advised the mutual informations for the parties;
 TRADES OF "the Lords sustain the defence, assoilzie the defenders,
 PERTH "and decern."* On reclaiming petition the Court adhered.
 v.
 PROUDFOOT, Against these interlocutors the present appeal was
 &c. brought to the House of Lords.
 May 13, 1801.
 June 9, 1801.

Pleaded for the Appellants.—The charters and other grants, as well in favour of the burgh, as in favour of the trades in particular, establish a right in the latter of being guild brethren; and the uniform practice that has followed upon these charters, confirms the same right. The consequence of this right is, that although the members of the trades' incorporations of Perth are not, while they continue so, members of the guildry incorporation; yet they have a title to be admitted members of that incorporation, as guild brethren, whenever they choose to leave the trades incorporation to which they belong, and, on contributing to the guildry funds the common dues of ten merks as a merchant's upset; at least they have, by the immemorial practice of the burgh, possessed that right without dispute, as a right agreeable to the true construction of the charters. It is believed that in every burgh, and every incorporation connected with a burgh in Scotland, the sons and sons-in-law of freemen are admitted upon easier terms than strangers: a natural practice, sanctioned by the charters as well as by general, ancient, and immemorial usage. The sons and sons-in-law of merchant burgesses, members of the guildry incorporation, have from time immemorial, as the sons and sons-in-law of guild brethren, been allowed admittance as members of the guildry incorporation, in right of their inheritance, at the low dues in question; and, in like manner, the sons and sons-in-law of trade burgesses have,

* LORD PRESIDENT CAMPBELL said, "The pursuers are not well founded in their plea, which goes to abolish altogether the distinction between guildry and trades. I am clear that they are distinct, and although sometimes the guildry have entered sons and sons-in-law of tradesmen at low or illusory dues, there seems to be no good reason why they should continue this practice longer than they find convenient."

Defence sustained.

from time immemorial, as the sons and sons-in-law of guild brethren, been allowed admittance as members of the guildry incorporation, at the same low dues, in right of their inheritance, not *ex gratia*, as the respondents have pretended, but in virtue of a right founded on the constitution of the burgh, and on ancient usage and possession.

Pleaded for the Respondents.—The right set up by the appellants is not supported either by the charters or by the usage pleaded, and upon which the appellants rely, and, if allowed, would be injurious to the incorporation of guildry, and also destructive to the constitution of the burgh of Perth. In the charters referred to, there is not one word of any of them which relates to the *sons and sons-in-law of tradesmen* having like privilege of entering the guildry with members of the trades' incorporations themselves, or with the sons and sons-in-law of guild brethren. Nor was there any thing in these charters which gave them, as "tradesmen burgesses of the town of Perth, equal rights and privileges with the merchant calling." And as to the usage referred to, of the twenty-three sons and forty-four sons-in-law of tradesmen who had been admitted members of the guildry incorporation between 1686 and 1788, this could not support the right claimed, because, 1st, It was not a uniform practice or usage, nor were the admissions granted as matter of right. They were conferred as matter of favour, and with declarations that they should not form precedents for the future. Of the instances adduced, ten at least were admitted under such express declarations.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *John Clerk, Thomas W. Baird.*

For the Respondents, *C. Hope, Ar. Fletcher.*

Unreported in the Court of Session.

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1804. <hr style="width: 50px; margin: 5px 0;"/> GRAHAM v. WEIR, &c.	COLONEL THOMAS GRAHAM of Balgowan, Executor of Lady Christian Graham, for- merly Hope,	}	Appellant;
	WILLIAM HOPE WEIR, Esq., general Dis- poncee of the Hon. Charles Hope Weir, deceased; and the Right Hon. CHARLES HOPE, his Majesty's Advocate for Scot- land, trustee of the late Lady Charlotte Hope or Erskine,	}	Respondents.

House of Lords, 20th February 1804.

CONSTRUCTION OF CONTRACT—ERROR—EXECUTRY—DOMICILE.—I regard to the succession of the Marquis of Annandale, the parties who were interested in his executry, after his decease, entered into a agreement, whereby they agreed, that if any of them should predecease the Marquis before their shares became vested in them, the nevertheless their shares should go to their children or next of kin instead of the survivors. The agreement was general in its terms, and did not distinguish between Scotch and English executry. It was subsequently found that the Marquis' domicile was in England. On of the contracting parties afterwards contended, that the contract did not refer to the executry distributable according to the law of England, but only to the Scotch executry. Held the terms to be general, and to comprehend all the executry of the Marquis, whether in England or Scotland, without distinction.

The Marquis of Annandale was possessed of large heritable estates both in England and Scotland. At an early period of life he became lunatic, was cognosced, and his estates in both countries placed under management.

A large moveable fund was thus accumulated, which, after all deductions, and an annual sum of £1800 paid (in the proportion of £981 out of the English estate and £819 out of the Scotch) for the lunatic's support, was placed out at interest,—the proceeds of the English estates in the public funds, and the proceeds of the Scotch estates in heritable or moveable bonds in Scotland; but the management of these estates was kept totally distinct. The former under the Court of Chancery, according to a decree made in Chancery by Lord Chancellor Hardwicke in 1751, which the appellants contended was founded wholly upon the construction, that there would be two executries—an English and Scotch executry, divisible according to two different laws; and that this construction was assented to, understood, and acted upon by the parties. The latter by the Earl of Hopetoun, who drew the interest, and frequently changed the securities as he thought proper. His Lordship's lady

as the only sister then alive of the Marquis, and entitled to succeed to his real estates on his death without issue, and intestate.

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The following parties, the children of the Countess of Hopetoun, were interested in the Marquis' executry, after his decease, viz. the Hon. Charles Hope Weir, Lady Christian Hope or Graham, and Lady Charlotte Hope or Erskine. They entered into an agreement, whereby they agreed, that if either or any of them predeceased the Marquis before their decease, the share of the executry became vested in them, that their next of kin should, nevertheless, be entitled to their share; and bound themselves accordingly, in the event of any one of them predeceasing the Marquis, before such vesting, to make payment, or convey over, one-third of the said executry, either to the next of kin, or to their executor or assignees.

Dec. 23 and
27, 1784.

Nothing was mentioned in the agreement about the English or Scotch executry; the terms used being general, without distinguishing the one or the other; and the parties understood that the whole would descend according to the law of Scotland.

The dowager Marchioness of Annandale was still alive, and had married a second time Colonel Johnstone, with whom she had children, viz. Richard Bimpde Johnstone, Charles Johnstone, Charlotte Henrietta Johnstone, who became brothers and sisters *uterine* to the lunatic, the Marquis of Annandale, and his sister, the Countess of Hopetoun, the latter being children of the dowager's first marriage with the late Marquis of Annandale. It had been decided in Chancery that these brothers and sisters *uterine* were, by the law of England, entitled, along with the Countess of Hopetoun, to an equal share of the Marquis' executry. While the latter was entitled also to the whole real estate in Scotland.

The above agreement, on the other hand, proceeded on the footing that the executry was divisible according to the law of Scotland, and that if any of the contracting parties predeceased the Marquis, their executors could claim nothing by the law of Scotland—the whole going to the survivors, upon the assumption that the *lex loci rei sitæ* would govern the distribution. Lady Christian Graham, at the death of the Marquis, was the only survivor of the contracting parties.

But, in an action of declarator raised by the brothers *uterine*, to have it found that the deceased's domicile was in England, and that they were entitled to share, by the law of England, in the executry, it was found, by decree of the

1804. Court of Session, "That George, Marquis of Annandale,
 _____ " was domiciled in England, and that his personal estate,
 GRAHAM " wherever situated, must be distributed according to the
 v. " law of England. Find that, in this case, the same divides
 WEIR, &c. " into three equal parts; and that one thereof belongs to
 Mar. 7, 1798. " the petitioner, Sir Richard Bempde Johnstone, another
 " third to Charles Johnstone, brothers uterine of the said
 " Marquis, and the remaining third part to Lady Christian
 " Graham," &c.

Before the above judgment had been pronounced the present actions of declarator had been raised—one at the instance of William Hope Weir, as representing his father, Charles Hope Weir, who had predeceased, against Lady Christian Graham, founding on the contract above set forth, and concluding to have it found that he had right to one-third of the proportion of the Marquis' executry, whether situated in Scotland or England. The other at the instance of the respondent, the Right Hon. Charles Hope, as trustee and executor of Lady Charlotte Erskine, conceived in same terms, while Lady Christian Graham raised a counter action of declarator against the respondents, concluding to have it found, in case it was adjudged that the Marquis' executry fell to be distributed according to the law of England, and that she, as sole nearest of kin, by the law of Scotland, was not entitled to succeed to any thing in that character, not even to the personal estate within Scotland, but only as one of the Marquis' executors in England, according to the law of England, then that the foresaid contract would have no effect, and formed no claim against the pursuer.

All these actions being conjoined, the question was,—Whether the written contract or agreement of December 1784, between the late Mr. Charles Hope Weir and his two surviving sisters, Lady Christian Graham and Lady Charlotte Erskine, was intended to be confined to the moveable executry of their half uncle, the late Marquis of Annandale, situated within Scotland only, and distributable by that law; or was intended to comprise the entire moveable succession wherever situated, whether in England or Scotland; And whether there was any error in the essentials of the contract, as to the law by which such executry was distributable, such as voided the contract?

The Court, on report of Lord Meadowbank, pronounced May 15, 1801. this interlocutor: "Having advised the informations for the
 " parties, in the conjoined actions of declarator, the Lords
 " assoilzie William Hope Weir, and the Right Hon. Charles

" Hope, Esq., now his Majesty's Advocate, as trustee for the deceased Lady Christian Erskine, from the whole conclusions of the declarator brought at the instance of Lady Charlotte Graham, now deceased, and now insisted in by Brigadier General Thomas Graham, her only son and representative, and decern; and in the actions of declarator brought at the instance of William Hope Weir, and the Right Hon. Charles Hope, as trustee foresaid, against the said Lady Christian Graham and Brigadier General Thomas Graham, decern, conform to the conclusions of the respective libels; but find expenses due to neither party."*

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* Opinions of the Judges.

15th May 1801.

LORD PRESIDENT CAMPBELL said,—“ This is a question upon the purport of a contract for dividing an intestate succession. As to the act 22 and 23 Cha. II. c. 10, it says expressly, that the right of representation goes no further in collaterals than in *children* of brothers and sisters, and it is presumed this does not include *grandchildren*—i. e. In Mr. Charles Hope's case, his children, who are grandchildren of Lady Hopetoun, the sister, and therefore that they would not take independent of the contract.—See p. 27. There might have been room for maintaining that this contract should have no effect at all, as it proceeded upon a misconception of the law, in supposing that the Marquis' executry would descend, according to the rules of intestate succession in Scotland, although his domicile was in England. But this plea has been waived. And it does not occur how the general words of the contract can be limited so as to make it apply to Scotch executry only, excluding what was in England.”

LORD METHVEN.—“ I am clear no such distinction can be made.”

LORD ARMADALE.—“ I am of the same opinion.”

LORD CRAIG.—“ So am I.”

Advising, 16th June.

LORD PRESIDENT CAMPBELL.—(*Vide*, Former notes.)—“ It was not till the year 1778, in the case of Elcherson, (*Davidson v. Elcherson*, Mor. 4613,) that the lawyers and judges took up an erroneous opinion, that the *rei sitæ* was the rule.

“ In 1751, when this estate was first managed, it is not probable that Lord Hardwicke had formed an opinion contrary to the authority of Erskine, the decision of Brown of Braid, (28th November 1744, Mor. 4604,) and the legal authorities in England. It was more probable he was under a mistake of a different kind, viz. that Scotland was the domicile of Lord Annandale, a Scots peer, a native of Scotland, and where his estate lay, and that the place of his confinement, as an insane person, was not to be regarded. This accounts for his making no distinction be-

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On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—Though the agreement 1784 is TECHNICALLY, expressly, and specially made referable to a succession so described as to be exclusively appropriate to the Scotch law ; and though the three contracting parties entered into an agreement, after a decree of the Lord Chancellor Hardwicke, distinguishing between succession to the Marquis' Scotch executry and the English, yet the Lords of Session have refused to construe the agreement, as made with a view to any such distinction ; and a written contract, which is limited only to one of two subjects, now stands adjudged by the Court of Session to comprise both these subjects. In other words, that the agreement includes and refers to the executry both in England and Scotland. The appellant maintains that this judgment cannot be maintained, because, on a sound construction of the contract, and keeping in view its meaning, and that principle upon which it proceeded, it was clearly shown that it had reference alone to the Scotch executry of the late Marquis of Annandale, and leaving the English executry to be distributable among the next of kin according to the English law. The whole language of the contract points at a succession distributable according to the law of Scotland. Its phraseology applies to succession only ; and the whole object and meaning of it was to provide against the Scotch rule of vesting or non-vesting ; and by an agreement to make it descend as if it had vested on a certain contingency. Hence, therefore, the respondents can claim nothing under the contract that is applicable to the Marquis' English executry—that as such part of his executry as was situated in Scotland must follow the domicile of the owner, which was England, all the executry in Scotland therefore was to be considered as English executry ; but that, at all events, the

tween Scots and English executry, as he seems to have understood that it would go together to the nearest of kin by the law of Scotland. Before the year 1784, indeed, the Court had pronounced the decision in the case of Elcherson, but whether Mr. Erskine, (the eminent professional gentleman who framed the contract), was aware of this, or thought the point settled, does not appear. A mistake, one way or other, if it has any effect at all, ought rather to set aside the contract altogether, than set up a distinction which the deed itself does not make. But there is no sufficient evidence of the mistake, or what the nature of it was."

agreement could not be held to extend beyond the Scotch executry.

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Pleaded for the Respondents.—By the above agreement, Lady Christian Graham bound herself, in the event that has occurred, of her surviving the Marquis of Annandale, and her brother and sister, to convey and make over two just and equal thirds of the executry and moveable estate of the Marquis, falling by death to her, as survivor to the executors and assignees of her brother and sister. The words of the agreement are express and unambiguous, and indicate a clear intention to make *the whole* executry without distinction the subject of division. And although there may be technical terms used which apply only to Scotch executry, yet these phrases, so used, arise solely from the deed being drawn out and executed in Scotland, where such terms are common, and most certainly cannot operate to affect or explain away the real substantial nature and subject matter of the contracts, which had in view the whole executry in general. And it would be of the most dangerous consequence to allow a critical analysis of the technical terms used in the agreement, to show that they could apply alone to Scotch executry, to affect the clear and obvious meaning of the contract. Nor is it any answer to say, that, by the law, as then understood in Scotland, the contracting parties knew that the Scotch executry would descend upon the principle of *rei sitæ*, according to the Scotch law of succession, because the contract, whatever this may have been, is sufficiently broad to carry any and every interest in the English, as well as in the Scotch executry; besides, it was by no means clear that the *lex loci rei sitæ* was the law of Scotland at the time. It was a doubtful point then; and it was not until a few years thereafter, that in *Bruce v. Bruce*, and *Lashley v. Hog*, that the *lex domicilii* was fixed as the rule for governing in all such cases.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said:—

“ MY LORDS,

“ I rather wished that a noble and learned Lord, who was present Lord
at the opening of this cause, and paid much attention to the appel- Alvanley.
lant's argument, had been present at the decision of it. I do not
think it necessary, however, to move for a delay on account of his
absence. I believe his sentiments to have been, that it was unneces-
sary for your Lordships to hear the respondents' counsel. The pro-
perty at issue by this cause is of very great value. The parties are
of the highest possible respectability, and the counsel on both sides

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have argued with much ability. Though I may not be inclined to give more than its due weight to this circumstance, that this judgment was unanimous, yet it weighs considerably with me, as it respects the interpretation of an agreement executed in Scotland by Scotch parties, and conceived in technical language of the law of Scotland.

"Having listened with much attention and anxiety to the argument maintained for the appellant, I cannot say that, in my opinion, I have heard any thing to convince me that the Court below had misconceived the meaning of the parties in this agreement. The rules of the House do not allow me, in a case of affirmance, to state the grounds upon which I think this judgment may be supported. I shall therefore content myself with moving an affirmance in the usual form."

It was ordered and adjudged that the interlocutors be and the same are hereby affirmed.

For Appellants, *Wm. Adam, Samuel Romilly, Francis Hargrave, Mat. Ross.*

For Respondents, *Sp. Percival, C. Hope, Wm. Alexander.*

(Mor. p. 8599.)

HARRY DAVIDSON, W.S., one of the Free-	} <i>Appellant;</i>
holders of the county of Stirling,	
The HONOURABLE CAPTAIN CHARLES EL-	} <i>Respondent.</i>
PHINSTONE FLEMING, .	

House of Lords, 18th April 1804.

RETOUR—FREEHOLD QUALIFICATION—VALUATION OF LANDS.—Objections having been stated to the enrolment of a freeholder in the county of Stirling, in respect that he had not the requisite qualification in land to the amount and value required by act of Parliament. Circumstances in which this objection was repelled, his retour of service containing sufficient evidence of the value of the lands, distinct from the office of coroner, which office, it was alleged, was of no appreciable value.

At a meeting of the freeholders of the county of Stirling, for electing a commissioner to serve in Parliament for that county, a claim was presented for the respondent to have him enrolled as a freeholder, as heritably infeft in all and whole the lands of Easter Glenboig, together with the office of Coroner in the county of Stirling.

The appellant objected to this claim of enrolment, on the ground, 1. That no *mandate* or authority had been produc-

ed by the respondent's agent who lodged this claim, such being necessary in regard to persons out of the kingdom at the time. 2. That there was no proper evidence of the separate *old extent* of the lands of Easter Glenboig, which he claimed.

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A majority of the freeholders repelled both objections; the case was then taken to the Court of Session, who sustained the first objection, and ordered his name to be expunged from the roll. No judgment was given on the second point. But the respondent having returned to Scotland, at the first meeting of freeholders which occurred thereafter (namely, in July 1802,) for the purpose of electing a member to represent the county in Parliament, he appeared personally, and lodged a new claim, founded both upon his title to the lands of Glenboig, &c. and also as *apparent heir* of his grandmother Clementina Lady Elphinstone. Objections were stated to this claim, to the effect that the retour of his service to the lands of Glenboig did not afford sufficient evidence of the *separate old extent* of the lands of Easter Glenboig, exclusive of the office of Coroner, or "Crownair" of the Sheriffdom of Stirling, and the latter being a mere heritable office, was not an estate in law which could support his title to be enrolled. The court of freeholders repelled these objections, whereupon a petition and complaint was brought before the Court of Session. The retour ran thus: "Hæc inquisitio facta fuit in prætorio burgi de Striviling," &c.; "Obiit ultimo vestitus et sasitus," &c. "de totis et integris quinque mercatis terrarum de Eister Glenboig, alias Eneboig, cum molendino, terris molendinariis, astrictis multuris ejusdem, et suis pertinentiis quibuscunque jacentibus infra vicecomitatum de Striviling, una cum officio coronatoris dict. vicecomitatus de Striviling. The descriptive clause was then followed by the valent clause thus: "Et quod dict. terræ de Easter Glenboig, cum molendino, terris molendinariis, astrictis multuris ejusdem, et suis pertinentibus una cum officio coronatoris prædict. valent *nunc* per annum summam dicem librarum monetæ Regni Scotiæ; et quod valuerunt *tempore pacis* summam quinque mercarum monetæ prædict.," &c.

The respondent contended that when the valent clause and the descriptive clause were taken together, the retour proved that the lands of Easter Glenboig, and the pertinents, are 40s. of old extent and upward. The descriptive clause, stating Easter Glenboig to be a five merk land, and

1804. that sum agreeing with the valent clause, thus affords sufficient proof itself that the value retoured was for the lands and the proper pertinents of the lands alone, and not for the lands and the office of coroner jointly. The appellant contended that the office of coroner was, by the retour, taken in conjunction with the lands of Easter Glenboig, and the mill, mill lands, and pertinents. That the lands and office were extended or valued together in one sum of five merks of old extent; and as it was impossible to say how much of that sum was the value of the lands, and how much the value of the office, so as to discriminate the one from the other, there was no legal evidence of the subjects he possessed being a 40s. land of old extent, as required by the act 1681. It was answered by the respondent, that no part of the five merks mentioned in the retour was to be ascribed to the office, but that the whole was the extent or value of the lands and pertinents.
- Mar. 9, 1803. The Court found "that the freeholders did right in enrolling the said Hon. Charles Elphinstone Fleming, in virtue of his titles to the lands of Glenboig and others, and therefore dismiss the complaint, and decern."
- Against this interlocutor the present appeal was brought to the House of Lords.
- After hearing counsel,
- THE LORD CHANCELLOR (ELDON) said—
- "My Lords,
- "The question at issue in this cause is, Whether, according to the true exposition of a certain retour, the respondent is entitled to be enrolled as a freeholder of the county of Stirling?
- "It arises out of an act of the Parliament of Scotland, passed in 1681, amended by an act of the 16th of his late Majesty. By the first act, it is provided, that no person should vote in the election of commissioners for shires or stewartries in Scotland, unless he was infert and in possession of a 40s. land of old extent. By the other, it is provided that such old extent should only be proved by a retour of the lands of a date prior to 16th September 1681. Upon these acts we are called to decide, whether or not the respondent, claiming on the lands of Easter Glenboig and other subjects, has duly proved that his lands are of the value duly required by law?
- "When this claim was made to the Court of Freeholders, the respondent was admitted to the roll. This produced a complaint to the Court of Session by Mr. Davidson, one of the freeholders, praying the Court to find that the freeholders had done wrong in enrolling the claimant.

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“ In this complaint, he insisted upon this more especial ground, that it did not appear from the retour, that the respondent had a sufficient qualification. In his pleadings, however, he alluded to another ground of complaint, made by another freeholder, that the respondent was not the apparent heir in a certain estate. It had been upon a claim, and on two grounds, jointly, namely, the apparency and the qualification, instructed by the retour, that the freeholders had enrolled the respondent.

“ Upon this point an objection has been stated on the relevancy by the respondent. With deference to the rules that may obtain in such cases in the Court of Session, I have little difficulty in saying, that those of your Lordships who are acquainted with the proceedings in the courts of this country must feel surprised that one person could avail himself of the objections stated by another. If such a matter had come before an English court, it would have been difficult to have given judgment on a ground of complaint, which was only stated in a different complaint brought by a different party, and therefore which could only be effectual when coupled with the complaint of that person.

“ But I pass this by, as merely a point of practice of the Court of Session. In matters of this nature, I know of no principle more safe than to adhere to whatever I find sanctioned by established practice.

“ When the question was further agitated before the Court below, I should be doing great injustice were I to withhold my warmest commendation from the most anxious, the most learned, and most efficacious endeavours of the counsel on both sides. The Court, at pronouncing judgment, was nearly equally divided. In the notes of their opinions, which have been handed to us, it was very obvious that they have felt great anxiety to do justice in this difficult subject.

“ The cause was also argued at your Lordships’ bar with great ability. I pledge myself to the parties, to your Lordships, and to the public, to have given myself the most anxious attention to this subject ; and if I am in an error in having formed an opinion, that it would not be fit to reverse the interlocutors in the present case, I can only say that I have not adopted this opinion without the most mature consideration. I have also attended to all the decisions upon similar questions, which were within my research, and of those decisions I may say, that it is out of the reach of my talents to reconcile them with each other.

“ When the question is asked, if this retour affords sufficient evidence of the requisite old extent of the respondent’s lands, I take it that this question is to be answered by a critical attention to all parts of the retour, to all that is found within its four corners (to use a phrase of Lord Kenyon’s), and by attending also to the decisions which have been given on similar subjects.

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"This brings me to consider the words of the retour itself, premising, that each and every part of it is given upon the oaths of the inquest. (Here his Lordship read the retour, and afterwards recurred to the different clauses.)

"Obiit, &c. 'de totis et integris quinque mercatis terrarum de Eister 'Glenboig, cum molendino terris, molendinariis, astrictis multaris 'ejusdem, et suis pertinentibus, quibuscunque jacentibus infra vicecomitatum de Striviling, una cum officio coronatoris dict. vicecomitatum de Striviling,' &c. Upon this part of the retour, I may observe, that I should have thought, what was introduced by the word '*cum*' was to be understood as a different subject from what preceded it, were I not persuaded from other retours, and the decisions upon them, that this word was not necessarily an introduction of a new subject.

"I lay little stress on the word '*pertinentiis*.' I lay more on the words '*jacentibus*,' &c. as importing a conclusion of the subject first introduced. Here the office of coroner is mentioned.

"If the construction depended only upon this descriptive clause, I can put no sense upon it but this, that it was meant to describe a five merk land, or land of the value of five merks; and this, whether the office had any value attached to it or not. It was not very strongly pressed that such an interpretation as I have stated was not to be given to the *descriptive clause*, if it was ruled by the *valent clause*.

"It was strongly put at the bar, and in the Court below, that the mill and mill lands were also included in the descriptive clause; and though the mill lands were of some pecuniary value, yet they were included with the other lands in the valent clause in the cumulo value of five merks; so, in like manner, it was argued, that some part of this value was to be ascribed to the office.

"'Et quod, &c. est legitimus, &c. de dictis terris cum molendino et pertinentibus ac officiis,' &c. Here you will observe that the mill lands are not specially mentioned, but included under the words '*dictis terris*;' and the office is again mentioned as a distinct species of property.

"From this part of the retour, it appears that the whole of what was landed property in the retour, would have passed under the description of '*quinque mercatis*;' and that, if the office of coroner had formed no part of the retour, that the cumulo valuation of five merks would have covered not only this five merk land, but also the other landed property.

"'Et quod dictæ terræ, &c. cum molendine, &c. una cum officio, &c. valent,' &c. It has been argued, that this clause is the one principally to be regarded; that it contradicts the descriptive clause; that it imports that the office was of some value, though the precise value was not set out; and that as the five merks value was put upon the whole subjects, it meant, that the whole taken together were of the value of five merks.

"In my opinion, the grounds for forming an opposite conclusion, and affirming the decision of the Court below, are satisfactory. First, I take the words, '*dictæ terræ*,' to be the same as if the words of the descriptive clause had been repeated in the valent clause, and then the valent clause would have stood thus :—'Et quod quinque '*mercætæ terrarum*, &c. cum molendino, &c. una cum officio, &c. '*valent*,' &c. This, in English, would have been that the lands of Easter Glenboig were a five merk land, but that these lands, when joined to the mill and mill lands and office of coroner, were only of the value of five merks.

"If the valent is to be construed as if *totidem verbis*, the same with the descriptive clause, and thus stating the lands to be a five merk land, it is impossible to put the construction upon it contended for by the appellant, if it can be shown that, in other cases which have received judicial decision, offices of the same or of a similar nature, have been retoured as having no valuation. Now, I think that more than one decided case appears, where lands and an office are retoured as of a cumulo value, but which were so dealt with, the office being not more than mentioned in the *valent* clause, was held as nothing, and that the valuation was to be laid on the lands alone. In some of these cases, the office of coroner was in this situation.

"If, as I understand the words '*dictæ terræ*,' the lands alone are to be held as a five merk land, it necessarily follows that the office must be held as having no valuation. This appears to have been the opinion of the majority of the Court. I have had infinite difficulty in bringing my mind to assent to this, but it is the conclusion I have ultimately come to.

"Of the cases formerly decided, I shall not enter into any examination; I may barely state, that if the opinion of some of the judges can be reconciled with all former cases, the judgment now in question cannot be so reconciled. This judgment appears to me to coincide with some of these cases, but to be contradictory to others of them. Some of the former decisions I never can accede to, others appear to me to be satisfactory.

"Though it may be unusual in this House to state any grounds for moving the affirmance of a judgment. I deemed it right to say so much in the present case. The whole question is, if there be within the four corners of this retour sufficient evidence that the respondent's lands are of the value required by law? I answer that, in my opinion, there is. And, in making this answer, I give due weight to every part of the retour; for whether more or less weight is to be given to the *valent* clause, we are bound to give *due* weight to every clause, construing any one part by the whole; and construing the valent by the descriptive clause, if such a construction be necessary, from the import of the whole.

"I shall move, in the usual form, that the decree should be reversed, meaning to vote in the negative of this proposition."

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"I do not entertain a doubt but this judgment ought to be affirmed. In a maze of contradictory cases, the Court appears to have proceeded in a safe way.

"The cases formerly decided upon similar subjects, may be ranged in two classes. I recollect the circumstances of many of these. One class is extremely strict and severe, and fickle in their interpretation of the instruments called retours. Retours are often drawn up with inaccuracy, nor are they, strictly speaking, framed in the words of the Jury, but prepared by the clerk to the Inquisition. This class of cases had its origin in a practice then very common, the making of nominal and fictitious votes, to which the Court was adverse. This practice consisted in a person possessed, for instance, in a £20 land of old extent, dividing it into ten freeholds of forty shillings each, so as to make ten votes. To prevent this, the act 16 Geo. II. said that you should be obliged to show, in proof of your qualification, a retour prior in date to 1681.

"These retours were also found very convenient for the purpose of making nominal and fictitious votes. And the retours themselves, which were entitled to great indulgence from their antiquity, often suffered by the decisions of the Court, from being found in bad company.

"But now that these votes are utterly gone, and all apprehensions with regard to them removed, the Court has adopted a more liberal mode of interpretation with regard to retours. I feel great satisfaction in the determination they have given upon this case."

It was ordered and adjudged that the interlocutor complained of be, and the same is hereby affirmed.

For Appellant, *Wm. Alexander, Math. Ross, Wm. Robertson, David Boyle, J. Abercromby.*

For Respondent, *Wm. Adam, Henry Erskine, John Clerk, Wm. Erskine.*

Appellant's authorities, *Sir Michael Stuart v. Campbell*, 22d Feb. 1745, *Falc. Dec.*; *Murray of Broughton v. Clark*, 14th July 1774, (*Wight's Election Cases*, p. 170); *M'Dowall v. Buchanan*, 20th Feb. 1787, *Fac. Coll.*

Respondent's authorities, *Campbell v. Freeholders of Renfrew*, 18th Jan. 1745; *Colquhoun of Luss v. Voters of Dumbartonshire*, 5th Feb. 1745, *Falc. Dec.*; *Fletcher v. Ferrier*, 23d Jan. 1781, (*Wight's Election Cases*); *Tod v. Miller*, 20th Feb. 1787, *Fac. Coll.*

(Mor. p. 14301.)

JAMES HUNTER, Esq. of Seaside, and JOHN LITTLE, WILLIAM LITTLE, ANDREW LITTLE, and GEORGE LITTLE, his Tacksmen of his Salmon Fishings, } *Appellant ;*

Right Hon. ROBERT, EARL of KINNOUL, WILLIAM LORD GRAY, SIR THOMAS MONCRIEF, Bart., and his Tutors, The Provost and Magistrates of the Town of Perth, &c. } *Respondents.*

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House of Lords, 9th May 1804.

SALMON FISHING—NEW MODE OF FISHING.—The appellant's lands of Seaside were situated on the Tay, about fifteen miles below the city of Perth, where it is about two miles broad at full tide ; but, when the tide retired, the proper channel of the river Tay was only about half a mile in breadth, and, consequently, a great area of fifteen acres of sand was left dry. On this he made an enclosure, by means of stakes and netting, contrived in such a manner as to open as the tide flowed, and shut when it ebbed. He alleged, that as the water was always salt at that place, and as the acts of Parliament did not apply to arms of the sea, or to friths or estuaries, but only to rivers, he had a right to do so. In an action at the instance of the superior heritors, held these stake nets illegal. Affirmed in the House of Lords.

The appellant, Mr. Hunter, is proprietor of lands situated on the north bank of the Frith of Tay, and about fifteen miles farther down the frith than the town of Perth. His grant was simply of a fishing in the *Water of Tay*, opposite to, or bounding his estate of Seaside and Auchmuir. He had let his right of salmon fishing to the other appellants ; and, at the place where the tide rises, the land on the side where Mr. Hunter's property lies, being covered with water to a great extent, exhibited *at low water* a large tract of sand. Upon these sands, by means of netting fastened to stakes, and which rose and fell with the tide, the Messrs. Little formed an enclosure of fifteen acres, having the stakes so disposed obliquely up and down the frith as to snare the fish into the netting. The netting was ten feet high, supported by poles. The meshes of the netting were of strong cord. At the end, and near to the south extremity, at a small run of water, there was an opening furnished with sort of valves, contrived for admitting all the fish which came with the rising tide, and for preventing their passage out

1804. when the tide fell. The valves were formed of netting^s, which were fastened at the top, but were loose at the bottom^a, and floated with the tide. The respondents are proprietors of the salmon fishing above Mr. Hunter's, and soon finding their fishings much injured, if not entirely destroyed, by these erections on the part of Mr. Hunter's tenants, they presented a bill of suspension and interdict, and also brought a declarator. The question was, Whether the acts of Parliament, regulating the salmon fishing in Scotland, and which prohibit, in general, the use of cruives, yairs, and *similar machinery*, in that part of the river where the flow and ebb of the tide is perceptible, prohibited the erection of such machinery as the present, on the sands opposite to Mr. Hunter's lands of Seaside?

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On the one side, it was contended that the machinery here used was nothing more than what was called a yair in Scotland. On the other side, it was maintained that the acts of Parliament could not be construed to include and apply to estuaries or friths which are mere arms of the sea; but it was admitted here, where the nets were fixed, that the water was at all times salt.

The acts seem only to mention rivers. The act 1563, c. 68, has this exemption, "Providing always, that this act shall in no way be extended to the cruives and yairs upon *the water of Solway.*" On the one side, it was argued that this exemption proved that all waters in the situation of the Solway, that is, all arms of the sea, or estuaries, were exempted. While, on the other hand, it was contended that it proved the reverse, namely, that all estuaries except the Solway were included under the acts, and, consequently, that the Tay was to be held as included. It was, besides, pleaded, that the custom uniform among all the proprietors of fishings on the Tay was by net and cobble.

The Court of Session passed the bill of suspension, to the effect of trying the question along with a declarator at same time brought and conjoined with it. The defenders (appellants), besides objecting to the want of title, argued, 1st, That the machinery complained of was not such as the statutes prohibited; the statutes only mentioned cruives and yairs, but their machinery was confessedly not a cruive, and neither was it a yair, which, at the time of the enactments founded on, was said to be a dam or enclosure in the bed of a river, formed of boards and wicker work. 2d. That the *situation* of their machinery was not *that* in which the statutes meant to prohibit the engines complained of. The acts were di-

rected against engines in the bed or alveus of a river, whereas their machinery was upon the *lands*, at a considerable distance from the river or channel at low water. And it was clear, from the whole tenor of the statutes, that they had in view the fisheries in rivers only; or, at most, on the sides of rivers, whereas the machinery in question was really in the sea, or on land covered at full tide only by the ocean, and by salt water. 3d, That the works were constructed so as not to impede the passage of the fry, or young salmon, up and down the river, the meshes of the nets being twelve inches in circumference.

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The Court, of this date, suspended the letters simpliciter, Mar. 3, 1801. and repelled the defences in the declarator. And, on reclaiming petition, adhered. The decree was in these Jan. 26, 1802. words:—"Find that the defenders' mode of fishing is injurious to the pursuers' fishings, and that they have a right to put a stop to the said mode, or to any other mode of fishing not formerly used in that part of the Tay: Find that the said James Hunter of Seaside, the proprietor of the said fishing, and the said John Little, and the other tenants thereof, and the servants employed by them, have no right to use the fishing in the manner described, or in any other manner not hitherto used in that part of the river, whereby the pursuers' fishings in the higher parts of the river are injured; and decern and ordain the said *James Hunter*, the proprietor of the said fishings, and his tenants, to remove and demolish the works described, erected by them, or by their directions, in the river Tay, and prohibit and discharge them from erecting any such works in time coming."

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1. The appellants have an undisputed right of salmon fishing in the Tay, and experience has amply proved that there are abundance of salmon to be found on their shores. But it is undeniable that the appellants could not fish to any advantage by means of net and cobble, and that the machinery which has been made use of by them since 1797, or some other apparatus of a similar kind, is alone calculated for the situation. The patrimonial interest of the appellants, therefore, to maintain their right to carry on their salmon fishery, by a mode of fishing from which they derive material benefit, but without which their title to fish salmon would be little better than a name, is obvious and strong. 2. On the other hand, the respondents

1804. have no fair patrimonial interest to oppose the method of fishing for salmon practised by the appellants, and, of consequence, their title to insist in this action ought not to be sustained. They have not been able to show, neither have they ventured to assert, that the number of fish caught by them since the appellants began to fish for salmon in the manner now complained of, has been less than in former years. If, indeed, the method of fishing practised by the appellants is a legal method, it would not be a sufficient reason for preventing them to exercise it, that, in its effects, it had diminished the number of salmon taken by the respondents; for every person is entitled to use his property in the manner most beneficial to himself, whatever consequences may result to his neighbour, if only he does not act *in emulationem*. The respondents' fishing has never been decreased, and therefore they have no cause to complain.

3. To fish at all upon the Tay, opposite to the appellants' lands, resort must be had to other means than that by net and cobble, because such apparatus, with reference to the situation, would be next to useless, in carrying on the fishery in order to yield any practical benefit to the proprietor. It is therefore the necessity of the situation which forces the appellants to resort to other means of carrying on the fishing; and this necessity, and the peculiarity of the situation of the appellants' fishings, are just precisely what lead to the question, Whether acts against fixed machinery in fishing, can at all apply to his fishings? The statutes, they contend, are inapplicable, 1st, Because they do not apply to machinery placed on the shores of friths, at a distance from the alveus or channel of rivers, at low water, and on sands, as is the appellants' case. 2d, Because the statutes point only against fishing at the alveus or beds of rivers, by means of cruives or yairs only, or at mill dams; but do not contain any expression which can include the appellants' machinery. 3d, Because the main object of the statutes being to encourage the breed of salmon, by protecting, on the one hand, the fry, and, on the other, the growth of fish in going up and down the river, they cannot apply to the appellants' engines, placed so far from the channel of the river as to cause no obstruction whatever.

Pleaded for the Respondents.—1. The machinery used by the appellants in their fishings is of an illegal nature, not only at common law, but as being prohibited by various acts of Parliament. 2. This machinery is necessarily injurious to the fishings in the superior parts of the river, and therefore

prejudicial to the fishings of the respondents, by diminishing the number of fish which would otherwise frequent them, and this not only by exhausting the fish in the river, but by impeding the passage up the river of those fish which the appellants do not catch. 3. And the respondents having a sufficient title and interest to insist in this action, without the concurrence of any public prosecutor, they are entitled to interdict to stop these illegal fishings.

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After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *C. Hope, Samuel Romilly, Math. Ross, M. Nolan, David Monypenny.*

For Respondents, *Wm. Adam, Wm. Alexander, John Clerk.*

NOTE.—For some account of what passed in the House of Lords, in disposing of this case, vide another case of the same kind, between the same parties. *Infra.*

DUKE OF QUEENSBERRY,	.	.	.	<i>Appellant;</i>
JOHN M'MURDO, Esq., late Chamberlain to	}			<i>Respondent.</i>
the said Duke,				

(*Et e contra.*)

House of Lords, 14th May 1804.

RECOMPENSE—QUANTUM MERUIT—CHAMBERLAIN AND FACTOR.—

This was a question about the remuneration to the respondent, as the Duke's chamberlain and factor. A third party, in name of the Duke, proposed the appointment to the respondent, with a salary of £200, verbally. The reply was, that the estates were so extensive as to raise a fear that it could not be done on so small a salary, as the expense and trouble would be great. But he stated he would make a trial. A factory was drawn out in his favour, without specifying the amount of salary. At the end of the first year, he wrote the Duke's agent, with his account of outlay and expense,—amount £165, leaving the amount of salary blank. He continued to do so for eleven years, always leaving the amount of his salary blank. In mutual actions brought against each other, the Court of Session found him entitled to £550 per annum for salary and other expenses. In the House of Lords this sum was restricted to £450 per annum.

The Duke of Queensberry, previously to the respondent being engaged as factor over his estates in Dumfriesshire,

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had them superintended by five several factors or managers, to whom he gave in all £900 per annum, the rental derivable from these estates being £8000 per annum.

Wishing to economize the management of these estates, while staying at the family seat of Drumlanrig, he spoke to his then guest, Sir Alexander Crauford, to make a proposal to the respondent, then engaged on the estate at a salary of £80, to undertake the entire management, as factor or chamberlain, at a yearly salary of £200. The estate stretched in length 60 miles, and in breadth, between 20 to 30 miles; and therefore he thought that it was too extensive, and would prove too laborious to be executed by any one person; but he agreed to make the attempt. Accordingly, when Sir Alexander Crauford made the proposal to the respondent verbally, he stated these fears and doubts, in such a manner as to convey the idea that it might be attended with such trouble and expense as that £200 would not adequately cover. By the appellant, however, it was alleged that this proposal was gone into by the respondent, and accepted of absolutely. The respondent, however, insisted that, had it not been for the death of Sir Alexander Crauford, he would have clearly established by his oath the nature of the agreement to be, that while Sir Alexander made the proposal of the office at a salary of £200 per annum, the respondent's answer was expressive of his opinion and fear that one factor was quite unable, looking to the extent of the estate, to manage the estates—that he could, therefore, form no proper idea of the extent either of the trouble or expense attending such an undertaking, and, consequently, could not judge what was the proper and fair and reasonable allowance for remuneration. But added, if upon trial he should be satisfied that he was able to discharge the trust reposed in him to the advantage of his employer, he would be happy to continue at what recompense the Duke might think suitable.

Nov. 15, 1779. A factory was executed in his favour, without specifying the salary he was to receive, and he entered on the duties of his office in spring 1780.

On rendering his accounts for the first year, he found that very near the whole £200 had been exhausted in necessary expense in managing the estate, and accordingly wrote the Duke's agent, sending in his year's accounts, and leaving in these his own salary blank, to be filled up, with the following account of expenses:

My clerk's salary for the year	£30	0	0	1804.
Board and washing for do.	20	0	0	—
Absolutely necessary to have four saddled horses constantly in my stables for myself and clerk in transacting the business of the estates, £12. 10s. each.				DUKE OF QUEENSBERRY v. M'MURDO.
Hay and oats, 50	0	0		
Travelling expenses self and clerk, for this year, 47	15	0		
Servant attending horses, wages and board, 18	0	0		
	£165	15	0	

Along with this account he wrote as follows:—"From this state, and in which I have not exceeded in one article, you will observe that the balance remaining from £200 is only £34. 5s.—and, subtracting from that, the expense of *entertaining people who are frequently coming here on his Grace's business*, with the expense of purchasing horses, and loss on them, I do assure you the whole sum is at least exhausted. I am far from asking any unreasonable allowance for my trouble in this business, which, you must be persuaded, is very considerable; but I shall most cheerfully submit the matter to his Grace, and shall esteem it as a particular favour if you will represent it in the manner you may think it most proper."

Mr. Tait, the Duke's agent, in his answer to this letter, wrote:—"I notice that the article for your salary stands blank in the account, and your reason for it; and I observe also the extra expense your office of chamberlain costs you; I believe the calculation you make is a very just one, and am fully satisfied that the salary formerly proposed is no way adequate to the trouble and expenses of the office; this I shall mention to his Grace, with what further occurs to me on that subject; and, at same time, I can with truth tell him, and I shall do it, that your attention to, and ability in executing the duties of your office, is above all exception, insomuch that I consider the estate to be as well managed, and his Grace's interests as closely attended to now, as when there were five factors on the estate;—I am particularly called on to mention this to his Grace, because I advised him against employing only one chamberlain, and repeatedly told, which was then my honest opinion, that no one man was capable of executing the office of sole chamberlain; but I now see that I have been mistaken; and, so long as your health continues, I have no doubt the management, under one chamberlain, will be more regular than under many."

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He continued to render the accounts yearly, with his salary left blank, in same manner. Mr. Tait wrote the Duke on the subject, and transmitted to him the above letter of the respondent. His Grace was therefore made aware of the above letter, and of this rendering of accounts with the salary left blank; but having free rent of a house, and taxes and coal, as well as other privileges enjoyed through a farm, which he held in set from the Duke, he took no notice further than to retain in his hands each year a sum that might be deemed adequate to his salary. Eleven years thereafter the Duke desired his agent, Mr. Tait, to have these blanks closed and settled. In the interval, other duties had been devolved upon him at the desire of the Duke. This was the political agency of the burghs of Dumfries, Kirkcudbright, Annan, &c. which jointly sent a member to Parliament, and which, consequently, devolved upon him additional trouble and expense. This request having been made to Mr. Tait, and communicated to him that the Duke had fixed to allow him £350 per annum of salary, although £200 was the sum agreed on by Sir Alexander Crauford. In answer, 6th June 1794, the respondent wrote, declining this as an adequate allowance, and offering, 1st, To take £400 per annum; or, 2d, If his Grace shall renew "his lease of my farm, with a salary of £350." In a subsequent letter to Mr. Tait, 30th September 1794, the respondent intimates his willingness to take £350 per annum, as salary, in future, "provided I have no further connection "with politics."

Thus the correspondence dropped, whereupon the Duke raised action against him for the money which he had retained to meet his salary. And the respondent, on his part, raised action for £243, as annual charges incidental to doing duty of factor, £300 as an annual allowance for trouble, £100 for annual charge of extra expense in political business, in all £643 per annum, as well as £3000 for the respondent's trouble in managing the political business for the last fifteen years.

The appellant contended that there was a concluded bargain, at the rate of £200 per annum, in full of trouble and expense.

Upon report of the Lord Justice Clerk, the Lords pronounced this interlocutor: "Find no evidence of there having been any finished bargain between the parties; find "Mr. M'Murdo, the defender in the original action, entitled "to an allowance of £550 Sterling yearly, during the con-

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"tinuance of his factory, in full of his claims, and remit to the Lord Ordinary to proceed accordingly; find the pursuer liable to the defender in the expense of process, and appoint an account thereof to be given into Court."

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Against this interlocutor the Duke appealed to the House of Lords, and the respondent, on his part, brought a cross appeal, contending that the sum allowed him by the Court was inadequate.

Pleaded for the Appellant.—There is sufficient evidence that the office was granted by the appellant, and undertaken by the respondent, upon an agreement or understanding that £200 per annum was to be allowed for trouble and charges attending the execution of the office. Even in his letter to Mr. Tait, he refers to a *salary*, which shows that he was not employed on an allowance left *indefinite* and unfixed. He says the *allowance* of £200 is *exhausted*, which shows not only that a salary of £200 had been mentioned, but that he had not then *rejected* it, as now alleged. If it had really been understood between Sir Alexander Crauford and him, that he undertook the charge as upon trial, and was to have an allowance calculated according to the value of his supposed services, or what the appellant might think so; or if the respondent himself had so understood the footing he was upon, it seems impossible that he could have written on these terms, or mentioned the £200 as the *allowance*. By that letter, he admits that he had no legal demand beyond the £200, though he conceived that sum too little, and hoped the appellant would make an addition to it, "cheerfully submitting the matter to his Grace." There was therefore a concluded bargain on the subject, which forecloses him from claiming more than the £200 per annum of salary. And it is no answer to this to say, that his annual accounts, from the very commencement, leave the amount of yearly salary blank; and that the commission and factory appointing him factor, does not fix him down to any amount of salary, and does not name the £200 as his salary; because, 1st, as to the accounts, the appellant was not bound to take any notice of them in this form; and, 2d, as to the deed of factory, it is not a common practice to insert the amount of salary in such writings. Taking, therefore, the whole facts and circumstances as they stand, or as the respondent states them, the demand as for a *quantum meruit* cannot be supported. But, 2d. Supposing the respondent entitled to receive as much as his labour deserved, the sum allowed by the Court of £550 a year is exorbitant. There

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are three facts established, and admitted in the cause, which satisfactorily show this, 1st. That the salaries of all the five factors employed by the Duke, before the respondent was employed, amounted to no more than £370. 2d. The respondent was willing to accept of £400 a year in full of all demands. 3d. That since the year 1795, when the respondent was dismissed, the duties have been performed by two factors, whose salaries together amount only to £230. The respondent, besides, has produced no evidence of the amount of the expense he had been put to in discharging the duties of his office, which he said amounted to £243, or of the necessity he was under of incurring such expense. Nor of the sum of £100 charged for entertaining people. Nor was any evidence called for on the part of the Court, or opinion of persons conversant with such matters taken, in order to ascertain a proper allowance for the respondent's trouble.

Pleaded for the Respondent.—There was never at any period a binding mutual agreement between the appellant and the respondent, whereby the latter should do the whole duties of the office of factor for £200 per annum, in full of every demand. The whole circumstances show the reverse. His letter to Mr. Tait, the Duke's agent, of 5th June, sent him at the end of the first year. His annual accounts demonstrate that there was no such agreement. And his letter of 30th September 1794, on which the appellant founds, was made under conditions of being continued in the Duke's employment, and that his leases should be renewed to him, which offers not being accepted of, cannot now prevent the respondent from claiming an allowance for his reasonable expenses, and a just recompense for his labour and trouble in the appellant's affairs. These claims he now prefers are, looking to the extent of the estates and the magnitude of the duties, both just and reasonable. He derived no other emolument whatever from his employment; and therefore these claims ought to have been allowed by the Court to their full extent; and he therefore trusts that, on considering the case, your Lordships shall declare that the sum to which the Court below has restricted his claims is not adequate indemnification for the expenses he necessarily incurred, the services he performed, and the duties he discharged.

After hearing counsel, it was

Ordered and adjudged that the interlocutor be varied,

by leaving out the word (five) and instead thereof inserting the word (four). And it is further ordered and adjudged, that *that* part of the said interlocutor by which the pursuer is found liable to the defender in the expense of process be, and the same is hereby reversed. And it is farther ordered that the cause be remitted back to the Court of Session in Scotland to proceed accordingly.

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For the Appellant, *C. Hope, T. Erskine, V. Gibbs, J. Montgomery.*

For the Respondent, *S. Percival, Wm. Adam, Charles Hay.*

Unreported in the Court of Session.

(Mor. p. 15298.)

WILLIAM GRIEVE,	-	-	-	<i>Appellant ;</i>
LIEUTENANT COLONEL FRANCIS CUNYNGHAME)				
of Dunduff, and JAMES GRAY, Writer, Edin-				<i>Respondents.</i>
burgh, his Commissioner,	-			

House of Lords, 19th June 1804.

LEASE—CONSTRUCTION OF WORD “HEIRS.”—A lease was granted for thirty-eight years to the tenant *and his heirs*, secluding *assignees* and sub-tenants ; and if the tenant was alive at the expiry thereof, for his lifetime, or for the lifetime “ of the *heir* or *heirs* “ of the said William Grieve.” In consequence of the tenant’s eldest son having chosen a different mode of life, the tenant, before his death, left a nomination of heirs in favour of his second son, disposing the lease to him. The landlord, after the tenant’s death, objected to this, stating that the word “ heirs ” in the lease, meant only the heir at law, and not heirs by destination. In the Court of Session, the tenant was decerned to remove. In the House of Lords the case was remitted, with considerable doubt expressed as to the judgment below.

The respondent’s predecessor in the estate of Dunduff set to the father of the appellant, “ William Grieve, *and his heirs*, secluding assignees and subtenants without the “ heritors consent, and that for the whole time and space of “ thirty-eight years, and the lifetime of the said William “ Grieve, if then alive, or of the *heir* or *heirs* of the said “ William Grieve who shall, at the end of the said thirty-

1804. " eight years, have succeeded to, and shall then be in the
 " possession of the said lands."
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The thirty-eight years mentioned in the lease, expired at Whitsunday 1797. The tenant, the appellant's father, died in the beginning of the year 1796—leaving a deed of nomination of the appellant, *his second son*, as his heir to succeed to the lease, and disposing and assigning it to him.

The reason which dictated this course was, that his eldest son, his proper heir at law, had a distaste to, and incapacity for farming pursuits, and had betaken himself to a different business. In early life he became a weaver, set up business for himself, was unfortunate, insolvent, and unsettled in his life: while the appellant always remained with his father, was bred up by him to the cultivation of the farm, and had, for many years previous to his father's death, undertaken the chief management.

On his father's death accordingly, the appellant continued the possession of the farm. He paid the half year's rent due at Whitsunday 1796, as representative of his deceased father, and the following half year's rent due at Martinmas, as tenant, and as having succeeded to the tack as such. For both he received a discharge from the respondent, who had succeeded as a remote substitute to the estate.

He also obtained a discharge for rent, dated 5th Dec. 1797, for the rents due at Whitsunday 1797, which receipt also discharges the rent due at Martinmas 1797, being for a whole half year after the specific term of thirty-eight years had expired. He further proceeded to make extensive improvements, by subdividing and enclosing the whole farm with hedges and ditches, &c., and continued to possess until 9th March 1799, when the respondent brought the present process of removing, on the ground, that the appellant was not the heir at law of the late William Grieve, and so not entitled to retain possession;—that assignees were secluded—and that, as his elder brother was in a different profession, he could have no right, and never had any possession at the end of the thirty-eight years, and, consequently, the lease was void and null. In defence, the appellant maintained that the term " heir " was here used in a general and comprehensive sense—that it was used in the plural number as well as the singular, and so must be held to include *that* descendant of the original lessee who should be nominated his successor in heritage and in possession at the expiration of the specific term; and although there was a clause secluding assignees without the landlord's consent, yet there

was no clause forfeiting or irritating the tenant's right, in case it should be assigned, or the farm subset. -

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The Lord Ordinary, of this date, repelled the defences, and decerned; and, on representation, he adhered, "re-serving to Adam Grieve, the eldest son and heir of line to his father, to claim the possession of the farm in question, if he is so advised, and to the proprietor his defences, as accords."

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June 2, —

On two several reclaiming petitions the Court adhered.*

May 16, 1802.
Mar. 8, 1803.

* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said,—“ I think the interlocutor gives too narrow a construction to the word “ heir.” Besides, the tack was not forfeited. If it does not belong to the second son, it must belong to the eldest, who, upon his father's death, had the legal right of succession, and the possession of his brother must be considered as his possession, even upon the principles of the interlocutor. The eldest son ought to be made a party. It is a mistake to suppose that the eldest son has lost his right, in a question with the landlord, by not being in the natural possession. Civil possession is sufficient; and if the respondent's argument be well found the civil possession would be no where else but in the eldest son. See cases of Freehold Qualifications, Melville of Greigstone, &c.

“ In the case of trustees, clauses against selling or contracting debt, do not necessarily imply a prohibition to alter the succession, or *vice versa*. Neither does a clause against assigning in a lease, imply a prohibition to alter and regulate the succession by *mortis causa* deeds. See *Stewart v. Hoome*, 8th July 1789, Mor. 15535. It is the meaning of the parties, that while the tenant himself lives, the landlord has so much confidence in him that he must possess himself, and not admit any other person in the character of an assignee, legal or conventional, into the farm—in so much, that it was disputed in the case of *Hepburn v. Burn*, 14th February 1759, Mor. 10409, Whether even the eldest son could, during his father's life, be assigned to the lease *perceptione*? But when the original tenant dies, there must be an end to his own possession and management; and if he has the lease not as a mere liferenter, but descendible to his heirs, somebody must be entitled to succeed to it, even the king, on default of other heirs. Why then should not the tenant make choice of his heir? In general, it would be much against the landlord that he should be tied up in this respect, for then, perhaps, heirs portioners would divide the subject among them, or a very unfit person might be the first heir. If the landlord can say this person, whom the deceased tenant has made his heir, is a bankrupt, or a bad man, he may perhaps be heard for his interest, but I doubt if he can set up a challenge against the tenant's appointment of his own succession. The form of the deed can be of no consequence in such a case as this. See the late case of Men-

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zies of Culdares, House of Lords, 13th November 1801, and Court of Session, 13th January 1803, where the doubt entertained in the House of Lords was, whether the *appointment of heirs* was not more to be attended to than the *dispositive clause*. See also Lord Galloway v. M'Hutcheon, same date. The petitioner therefore narrows his argument too much, when he supposes that the tenant ought to choose his heir out of his own family, or among his own descendants. There is no such limitation in the tack, either expressed or implied. The case of Deuchar v. Lord Minto, 20th November 1798, Mor. 15295, I think, was wrong decided. See notes upon it, 20th Nov. 1798."

LORD MEADOWBANK.—"The second son is in this case the heir. In the Roman law, a Testament made by a fictitious *emptio venditio* was good."

LORD HERMAND.—"I am of the contrary opinion. If this were the case he (tenant) might bring in a *stranger as heir of provision*. There is a speciality here. There is not only a lease for a specified term, but a liferent to the lessee after that term, and to his heir. The tenant cannot change the liferent right."

LORD ARMADALE.—"If one stranger may be named as an heir, he may name another, and so on indefinitely. I do not think that belongs to the description of rights under the lease. What if the parties make a mutual entail to themselves and their heirs, whom failing, to the heir of C. Can this mean any thing but the heir at law of C? I think not."

LORD JUSTICE CLERK.—"I am of the same opinion. If simply granted to heirs, without specifying seclusion of assignees, I would consider the power of the tenant as more extensive."

Advising, 8th March 1803.

LORD PRESIDENT CAMPBELL said, (*Vide Former Notes*).—"I think the writer of this petition has not carried his argument so far as he should have done, owing to his desire of getting out of the decision of Deuchar. But that decision was wrong. The appointment of an heir by a *mortis causa* deed, in whatever form, is very different from a sale or alienation *inter vivos*, though the form of the deed may be the same, or nearly so, in both cases. A conveyance by disposition or assignation, is the proper form of regulating succession as well as of transferring the property *inter vivos* to a purchaser. The one is revocable, the other not. The one implies *revandice*, the other not. Upon the one, the grantor may be inhibited, on the other not; the grant in the one represents me, and is

the law of Scotland "heirs" is a comprehensive term, and includes heirs of every description, whether heirs at law, or heirs of destination; and it means heirs of destination preferably to heirs at law, so that those last shall take the succession only in case there are no heirs of the former description. When a person binds himself and his "heirs,"

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liable for my debts, at least *in valorem*, in the other not. A judge ought to be able to discriminate between these things. But this accidental circumstance cannot vary the substance of the transaction any more than it can turn property into superiority or wadset, or *vice versa*. In tailzies, the altering the order of succession is one thing and selling another, yet the name of the deed is the same. The second son here is truly one of the heirs at law. What if the eldest son collates with him, the one throwing in the tack and the other the stocking? Can it be maintained that this too is prohibited? If we consider this to be a tailzied fee, the eldest son should be understood to be entitled to the share of moveables, without collating, this has never been understood. In the case of a middle brother being tacksman, may he not choose any of his brothers to be his heir, or may not a father prefer his eldest daughter? See Ersk. b. iii. tit. 9, § 3. It is laid down that a man cannot disinherit an heir effectually without naming another heir, but here another heir is named. See Bankton, b. iii. tit. 4, § 23. Dict. voce "Succession." Neither can the first heir, by simply renouncing, let in the next heir during his life. (Ibid.) Yet in the case of Barganny the first heir repudiated, so as to let the next heir in. Heirs by destination take in preference to legal heirs; and the king cannot take as *ultimus hæres* until all the other heirs are spent, still less can the landlord or superior. The idea of the landlord's naming the tenant's heir is absurd. The tenant might as well name the landlord's heir, to whom the rent shall be payable. Where a right is heritable, and not limited by tailzie, the *testamentum factum* is entire, though, no doubt, heritage requires a different *form of deed* from moveable property. The common rules of succession are even more entire than in the case of a bond to heirs secluding executors. It is said that the tenant may abuse the power of naming his heir, and may evade the exclusion of assignees. But is this a reason why he should be deprived of the fair exercise of his right? Fraud or collusion must always be one exception, but the exception must not be turned into the general rule. The late case of Lord Galloway illustrates this. What if it be a tack of teinds with a long duration,—must the tacksman let it go to his heirs of line, and not to the heir succeeding to his estate? Secluding assignees is truly a *right of pre-emption*; and putting it into the landlord's power to interfere in a competition of heirs, is enabling him to extort a higher rent from the one or the other."

President Campbell's Session Papers.

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the obligation attaches to the heir whom he calls to the succession by will, as well as to his heir at law. In like manner, when he stipulates a right in favour of himself and his heirs, he stipulates for him whom he shall name his heir, as well as for him who, failing such nomination, would take the succession by disposition of the law. The more comprehensive term "heirs" is sometimes limited by the use "of heirs of the body," "heirs male," "heirs of a particular marriage," and so forth; but here the terms used are general, and comprehend all kinds of heirs. The exclusion of assignees does not limit, in this case, the term thus used, because that clause had solely in view to prevent the lease or farm being put into the market, or carried to a subtenant, and even if it were otherwise, the exclusion being only made unless with the consent of the landlord—the latter must be held to have consented, by his taking rent from him as tenant, and allowing him to continue possession for two years. Apart from express clause, law declares that in leases of long duration, and also in *liferent leases*, the tenant has a power to assign, and that it is only by an express clause, excluding assignees and subsetting, that the tenant can be prevented from so doing. The lease, in this case, does not absolutely and totally deprive the tenant of this right. There is implied a power to assign with the landlord's consent. The respondent has homologated and approved of the appellant's title of possession, and so his consent is presumed. It is true, that by a peculiarity in the law of Scotland, an heir must be appointed by a deed *inter vivos*; and so far the conveyance resembles that which the granter would fall to execute, were it his intention to transfer the right from himself to another in his own lifetime. But this goes only to the *form* of the deed, not to the substance of it; for, in all questions of succession, the *will* of the party is the governing rule, except only in cases of entail, where, for obvious reasons not connected with the present subject, *will* avails nothing, and form and expression every thing. But here there is a contract of lease—a *bona fide* contract, and the terms of the contract cannot be infringed; and where the word heir occurs in such, it is not to be construed with the same strictness as in a deed of entail.

Pleaded for the Respondents.—The grant of the lease to William Grieve and his heir, or heirs, is a destination which, by the law of Scotland, limits the succession to the lease to the heir at law of the tenant. The appellant is not heir at

law of the tenant, but his assignee in the lease ; and, as assignees were expressly excluded without the consent of the landlord, he has no right to remain in the farm. Such is the interpretation put on such terms of destination in other species of real property. In contracts of marriage, the property settled on the heirs of the marriage does not alter the legal rule of succession ; and, accordingly, the heir at law is the party held to be pointed out by such destination, and not a stranger, or heir nominate. In this case, the appellant's only right is the assignation of a tack in favour of an individual whom the law regards as a stranger, and therefore it is null and void by the express terms of the contract.

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After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

“ My Lords,

(His Lordship began by reading the facts, as stated in the cases, viz. the lease of 1759,—the assignation by William Grieve,—his death, and the state of his family at that time, stating that the appellant, the second son of the original lessee, had continued in the possession after the expiration of the term of 38 years, and that the respondent's father had received rent from him. He detailed the circumstances of the present action, with the proceedings of the Court of Session,—the several interlocutors, and the appeal now before their Lordships, and then said).

“ The question was, Whether, in a lease which was granted to a man and his heirs, secluding assignees and subtenants, it was competent to the tenant to constitute his heir, or if the heir must not be in strict sense his heir of line ? If the heir of line is the only heir, the second son cannot hold the lease.

“ This is a question of very great importance to landlords and tenants.

“ In Lord Minto's case, decided in 1798, the term heirs was found Deuchar v. Lord Minto, to mean heirs of line ; and although the appellant has attempted to distinguish that case from the present, yet I can perceive no solid Nov. 20, 1798. M. 15295. ground of distinction between that case, as it is reported, and the present one. There may, however, have been a difference between that case and the present one, of which I am not aware, as it is only very shortly noticed in the report. But, supposing that case should be held as having decided the general principle that “ heirs ” mean “ heirs of line ” only, it is said, that previous to that decision there was no idea that a man, having a lease conceived in these terms, could not nominate his heir. And if that be true, there must have been a number of similar leases then existing, and still subsisting. Upon the

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parties, therefore, in which Minto's decision was pronounced, that decision must have been a surprise.

"From 1798 to the present case, it does not appear that Minto's case has ever been followed as a precedent in the Court of Session, although it may have been followed in practice; and this is an important consideration, if that decision was a surprise upon the parties to leases.

"But it was justly observed, that Minto's case cannot bind this House, neither can it be held as binding the Court of Session.

"From the pleadings in the Court below, which are very ably drawn on both sides, it appears that the consideration of the case was limited to the clause which lets the farm to William Grieve and his heirs, &c., and *that* which describes the commencement and endurance of the tenant's interest, and that no attention was paid to the other parts of the tack. It is proper, however, that the whole of the tack should be considered.

"It has been said on the part of the respondent, that the term 'heirs' being followed by the words 'secluding assignees and subtenants,' can only mean heirs of line, and that the words '*have succeeded to*,' can only be applied to heirs of line, who alone can be said to *succeed*, as no other can acquire the possession but as *dispones*, to whom the term '*succeed*' is not applicable.

"But it appears to me, that an assignee, and an heir nominated, are very different characters; and that by assignee, in this case, is meant that person who is an assignee, not being an heir nominated.

"With respect to the words 'who shall have succeeded,' &c. and to which considerable meaning was attached by a noble Lord (Lord Rosslyn), I think that the heir nominated may as well be said to succeed as the heir of line. Supposing that these words were to occur in a deed conveying a fee, it seems impossible to maintain that the term '*succeed*,' would not apply to a donee as well as to the heir of line.

"It has been contended for by the appellant, that by 'heirs' is implied every one of the tenant's family. But although this may have been the intention of parties, which I think probable, yet it cannot receive that interpretation in a judicial sense, and its construction must be confined either to the heir of line or to the heir nominated.

"The point for consideration in this case is, what is the meaning of the parties, as to be discovered from the whole of the *lease* taking it altogether?

"The prestations by the tenant are laid on him, 'his heirs, executors, successors,' &c., who would be liable to make good these prestations, while, according to the limited sense contended for by the respondent, the heir of line would receive all the benefit of the lease.

"From the particular circumstances of this case, it does not follow that it may not be differently decided from Lord Minto's case, without interfering with the general principle thereby decided.

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"The appellant having possessed the farm previous to the termination of the thirty-eight years, he must have done so, either as dis-
ponee, subtenant, or heir. During such possession, rent was accepted by the lessor, which in this country would have confirmed the possession, unless it had been received under protest, the lessor expressly declaring, that it was not to be considered as a confirmation of the possession. And it appears, that on the same day on which this case was decided, the Court gave effect to this principle in another case. In that case indeed the tenant was many years in possession; but the principle must be as effectual, where there is only one payment, as when there are many. Yet no attention seems to have been paid by the judges to this circumstance, and the opinions do not inform us why it was not attended to.

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(Mor. Dic. p.
15301.)

"When we are told that this case follows as a consequence of Lord Minto's case, there is the greater reason for having the point well settled, if that decision is to be considered as a surprise.

"The noble Lord who preceded me in my official situation, thinks it rightly decided; but I have infinite doubts in my mind as to its propriety; and, when I consider the different and contradictory opinions of the judges below, and the great importance of this case, arising from the number of similar cases, I would propose to remit the cause for farther consideration, directing the Court to review their judgment generally—regard being had to the meaning of the word 'heirs,' as used in all parts of the tack, also to the interest the elder brother may have in the same.

"From anything I know of the form of proceeding in the Court of Session, it may perhaps be competent to Colonel Cunynghame, after having succeeded in ejecting the heir nominated, to say to the eldest son, although you may be the heir of line, yet you are not the person described in the tack, who is the heir nominated, and not the heir of line.

"I have also great doubts, whether, supposing the second son is to be ejected, the eldest may not be entitled to the farm, although not in possession at the expiration of the thirty-eight years. If the father had died the day before the expiration of the thirty-eight years, and the eldest son had been then in Hamburgh, so that it would have been impossible for him to be in possession at the expiration of the thirty-eight years, could it be said that in such case he was to be deprived of his right? And, on the same principle, may he not plead the present cause as having precluded him from the possession of the farm, and that, as it was impossible for him to obtain possession, his interest ought not to be affected by the want of it?"

Ordered and adjudged that the cause be remitted back to the Court of Session in Scotland, generally to review

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the several interlocutors complained of, and to consider how far the meaning of the word "heirs," as that word occurs in the several parts of the lease of the 18th January 1759, and the general contents of that lease—may affect the construction to be given in this case to the words "William Grieve and his heirs," and the words "the heir or heirs of the said William Grieve" "who shall, at the end of the thirty-eight years, have succeeded to, and shall then be in the possession of" "the said lands;" and whether any rent has been received by or for the respondent in this case, under such circumstances as ought to affect his right to succeed in this process of removing, and how far such right may be affected by any claim which the eldest son, and heir of line, of the said William Grieve may have to the possession of the farm, if the appellant hath not right thereto.

For Appellant, *Samuel Romilly, Thos. W. Baird.*

For Respondents, *Wm. Adam, Wm. Erskine.*

NOTE.—Under this the remit to the Court of Session, the Court on resuming the question, ordered memorials, and afterwards pronounced an interlocutor (21st Nov. 1805) adhering to the interlocutors appealed from.

The eldest son then came forward to claim his right under the lease, and brought a reduction of his father's will, and a declarator of his right to succeed to the lease. These two processes having been conjoined, the Court pronounced an interlocutor reducing the nomination of his father, and in the declarator, decerned in favour of his right to succeed. The landlord then entered into an arrangement with the two brothers, by which he consented that the second son should be continued in the possession of the lease, and an interlocutor was pronounced upon that arrangement.—Vide *Mor. App. Tack*, No. 9.

REBECCA HOG, otherwise LASHLEY, Spouse of THOMAS LASHLEY, Esq. of London, and him for his interest,	}	<i>Appellants;</i>	1804. <hr style="width: 50%; margin: 0 auto;"/> LASHLEY, &c. v. HOG.
THOMAS HOG of Newliston,		<i>Respondent.</i>	

(*Et e contra.*)

House of Lords, 10th and 12th July 1804.

DOMICILE—JUS RELICTÆ, OR GOODS IN COMMUNION—LEGITIM—DEDUCTIONS—BANK STOCK—TRANSFER—TRUST—PROOF OF—COMPETENCY OF CROSS APPEAL.—In the former branch of this cause, Mrs. Lashley was successful in claiming legitim. She also claimed a share of the goods in communion, as due at the dissolution of the marriage, in right of her mother, who died in 1760. This branch of the case was one of the questions remitted. In answer to this claim, the respondent contended that the domicile of the deceased Roger Hog, at his wife's death, was in England, and therefore, as neither by the law of England, nor by the contract of marriage entered into there, any such claim could arise, she was not entitled to claim such. In disposing of the whole remaining points in the cause, the Court of Session held, 1. That the domicile of Roger Hog, at the time of his wife's death, was in Scotland. 2. That there was no ground for Mrs. Lashley's claim for a share of the goods in communion, in right of her mother, as at the dissolution of the marriage by her death. 3. That in accounting for the legitim, the respondent was entitled to state himself as creditor for the value of the Kingston property belonging to him, uplifted by the father, as also for a bond for £1000, granted to him and his wife in conjunct fee and liferent, and to his children in fee, and was entitled to deduct these from the amount of the moveable estate; but was not entitled to deduct the expense of confirmation in Scotland, and probate in England. 4. That Mrs. Lashley could not claim both the voluntary provisions settled on her, and also her legitim; and therefore, what she had received of the former must be deducted, along with the annuity paid to her, and the bond debt of £700 due by her husband. 5. That the 120 shares of bank stock transferred to and vested in the respondent's name, previous to his father's death, were not subject to Mrs. Lashley's legitim. In the House of Lords, the first point, as to the deceased's domicile at the time of his wife's death, was affirmed. The second point was reversed; and held Mrs. Lashley entitled to her mother's distributive share of the goods in communion as at her death. The third and fourth points were affirmed;

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excepting as to the expenses of confirmation. In regard to the fifth point (bank shares), the House of Lords specially found, that these, in so far as it should appear they stood in the name of the respondent, under an agreement or understanding that he would invest the same on land to be entailed; and also such shares, the dividends of which, notwithstanding the transfer in the respondent's name, were uplifted and received by the deceased, were to be considered subject to Mrs. Lashley's legitim, and interlocutor reversed in so far as inconsistent with these declarations, and affirmed, in so far as agreeable thereto; and remit made to ascertain the last point and the amount of her claim in right of her mother.

The standing orders of the House of Lords, 8th March 1763, requiring cross appeals to be given in within one week after the answer put into the original appeal; and this not having been done, the cross appeal dismissed.

1737. Mr. Roger Hog, a native of Scotland, settled in London as a merchant, and married an English lady there in 1735. She had a portion, consisting of personal estate of £3500 and, on marriage, an antenuptial contract was entered into, by which Mr. Hog, in consideration of this tocher, became bound to settle £2500 of this sum in the purchase of lands, to be taken in the names of trustees therein named, to be holden by them for the behoof of husband and wife in life-rent during their respective lives, and after the several deceases of the said Roger Hog and Rachael Missing, his intended wife, "then to the use and behoof of such child or children of the body of the said Rachael Missing by the said Roger Hog lawfully to be begotten; and for such uses, intents and purposes only, and for such estate or estates, either in fee simple, tail," &c.

A power was reserved to the wife to make such disposals, appointments, &c. as to the same, notwithstanding her coverture, by any deed or writing; and, in default of such writing, it was to be equally divided between their children so begotten, "share and share alike."

In terms of this contract, a property was purchased in Kingston upon Thames, and conveyed to the said mentioned trustees for the foresaid purposes. After realizing a considerable fortune, Mr. Hog resolved to retire to Scotland, and, with that view, purchased near Edinburgh, in 1752, the estate of Newliston, where, from that time, it was alleged by the appellant, he chiefly resided until his death in 1789.

1789.

But, in the interval, the Kingston estate was conveyed by

Mrs. Hog to her eldest son, the respondent, reserving his father's life rent use. 1804.

Mrs. Hog died at Newliston in 1760, leaving Thomas, the respondent, Roger, Alexander, Rebecca, the appellant, Rachael, and Mary, by which event a dissolution of the marriage took place. At this period the bulk of Mr. Hog's personal estate was in England, where he continued to carry on business, and had a share in a banking house. He renewed this partnership in July 1765 for a period of five years, and assuming at same time his second son Roger as a partner. He still retained his London house. About the same time the Kingston property was sold, after the respondent Thomas came of age, and the price, amounting to £2604. 5s., was vested in the hands of his father.

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Rebecca married Mr. Lashley in 1776, when her father proposed to give her £2000, if the father of Mr. Lashley would settle a similar sum.

It has been seen in a former case, that the issue all died except three, Thomas, Rebecca, and Alexander. It has been also seen that Mr. Hog, previous to his death, was in the habit of making large advances to his children, in name of portion, and which they accepted "in full satisfaction of all they could ask or demand, by and through his decease, or the decease of their mother, in name of legitim, or otherwise," but Mrs. Lashley had not *accepted* such.

He died at Newliston in March 1789, leaving by settlement certain lands therein mentioned, together with all his personal property, (some of which was in Scotland, some in England, and some in France), to his eldest son, the respondent, burdened with the payment of debts, legacies, and provisions to younger children; the residue to be employed in purchasing land to be entailed to him and a series of heirs, in the same manner as was already done in regard to the estate of Newliston.

Mrs. Lashley was left a provision of £1500, but, as has been already explained in a previous case, she repudiated this provision, and successfully claimed her legitim, and was found entitled to the whole, upon the principle that the other children had discharged theirs. It was at same time decided that the shares of the children who had renounced did not accrue to their father, but fell under the division in common with his other personal property. And it was further decided, that Government stock, or annuities in England, belonging to the deceased, were personal; but

June 7, 1791.

1804. the case was remitted to the Lord Ordinary to hear parties further as to the other annuities in the French funds, which point was superseded. They likewise remitted to the Lord Ordinary to hear parties upon Mrs. Lashley's claim, in right of her mother, to a share of her father's personal property as at the dissolution of the marriage. An appeal was taken against these judgments, but the interlocutors were affirmed.

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Present
Question.

Ante 7th May
1792.

This part of
the case dis-
posed of by
the separate
appeal, re-
ported ante
vol. iv. p. 364.

The present questions arose on a *resume* of the case before the Lord Ordinary, in terms of the remit of the Court of Session; and, pending the discussion thereof, the appellant's brother, Alexander Hog, brought his action and claim for a share of the goods in communion as at his mother's death, and also for his share of the legitim from the estate of his father, which was finally disposed of by appeal, and the claim totally rejected. The following questions were debated in the present case, 1. Whether Mrs. Lashley had a good claim, in her mother's right, to a share of the personal estate of her father at the dissolution of the marriage? 2. What was the true amount of Mr. Hog's personal estate at his death, subject to the appellant's legitim?

In regard to the first point, the respondent contended, 1st, That Mr. Hog's domicile, at the *dissolution* of his marriage, was in England, whatever his domicile might have been at the time of his death. And, consequently, his domicile was in a country where the right of *jus relictæ* could have no place. 2d. That Mr. Hog being confessedly domiciled in England when his marriage was contracted, the patrimonial rights of the contracting parties, and their heirs, *at its dissolution*, must be regulated by the law of that country. 3. That Mr. Hog's marriage settlement excluded his wife's *jus relictæ* virtually or by implication. In answer to these, it was maintained by the appellant, 1. It was difficult to point out a criterion of general application for ascertaining the domicile of a person who dwells occasionally with his family and household in different places. In such a case, intention of permanent residence seems to be one of the chief characteristics. All the evidence of intention which can be collected from Mr. Hog's correspondence shows, that in 1760 he had taken his final resolve to remain with his wife and family in Scotland, where he was then residing, and where he had principally resided for the six years preceding. In all his letters to his friends in business, and other friends, from 1750 downwards, he expresses his pur-

pose of settling there. In 1752 the estate of Newliston is purchased. He disposes of his dwelling house in England in 1754, and they were residing at Newliston in 1760, at the dissolution of the marriage by Mrs. Hog's death. He was therefore domiciled in Scotland. 2. The *status* of parties during the subsistence of the marriage, depends indisputably on the law of the place where they permanently reside. The wife, during her coverture, is subject to her husband's domicile, which changes with his domicile, wherever that may be. Here it was changed voluntarily and of free choice by both; and this change could not be absent from the understanding of the wife, even on entering into marriage with a Scotsman, so that this domicile being changed, during the subsistence of the marriage, from England to Scotland, the rights of parties must be determined according to the law of their domicile at the dissolution of the marriage, which was undoubtedly Scotland. 3. That according to that law, a wife who accepts a conventional provision, is excluded by special statute from her right of terce. Yet her *jus relictæ* still subsists, unless a renunciation be expressly stipulated.

The Lord Ordinary, on this branch, pronounced this interlocutor: "Finds that the contract of marriage betwixt the late Mr. Hog and his wife, is not so conceived as to bar, either in England or Scotland, a claim to legal provisions; finds that Mr. Hog, at the time of his wife's death, had two domiciles, one in London, and another in Scotland, and that the last was the principal; finds, that by the law of England, in which country Mr. Hog and his wife married, and in which they were both domiciled at the time, a communion of goods does not take place in that country as it does in this, and that a claim is not competent there, as it is here, to the executors of the wife, for a certain share of the moveable estate belonging to the husband at the time of her death; finds that the transference of Mr. Hog's principal domicile to Scotland did not operate any alteration of the right of him and his wife, as married persons, pre-established by the law of the country in which they had contracted; therefore finds the pursuer has no claim, in right of her mother, to any share of the moveable estate belonging to her father at the time of her mother's death, and so far assoilzies the defender from the action, and decerns." On representations from

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1804. both parties, the Lord Ordinary pronounced an interlocutor to the same effect.
- LASHLEY, &c
v.
HOG.
Mar. 5, 1794.
Nov. 25 and
26, 1794.
- On reclaiming petition, the whole Lords pronounced this interlocutor: " Finds that the deceased Mr. Hog, at the dissolution of his marriage, had his domicile in Scotland; and, before answers as to the question, How far Mrs. Hog's executors, at the dissolution of the said marriage, had a right to a third of the goods in communion, and the petitioner's title to a proportion thereof with interest? appoint counsel for the parties to be heard thereon in their own presence, upon the day of " *

Interlocutor 25th Nov. 1794.

* Opinions of the Judges:—

LORD PRESIDENT CAMPBELL.—" The question turns on the marriage settlement and other deeds of the deceased Mr. Hog of Newliston. The contract was entered into in England, by parties resident there at the time. It was an English deed; and we ought to know what was the import and effect of it there, Whether, by the nature of the settlement, the provision to Mrs. Hog was taken in satisfaction of all demands; and, Whether the after change of residence made any difference?

" As to the question of fact, whether Mr. Hog's residence was in England or Scotland at the period of his wife's death, it seems difficult, in a case of this kind, to go upon the idea of his having a double residence. We must adopt the law either of the one place or the other as the rule, and not the law of both, and, therefore, if the *lex loci domicilii* is to regulate the question, we must find out where his domicile was, and fix it either in Scotland or in England.

" In fact it was in Scotland, at the period of Mrs. Hog's death, though he also had a house in England, and, with the assistance of partners and clerks, was carrying on trade there.

" But, granting this to be the case, the question of law still remains behind, and is attended with considerable difficulty, whether, and how far Mrs. Hog, and her nearest of kin, were barred by the nature of her marriage settlement executed in England, from making a claim *jure relictae* upon the personal effects belonging to her husband in Scotland, or wherever situated?

Mr. Grant had given a different opinion.

" Sir John Scott's opinion, annexed to one of the papers, is, that she was not barred from making any legal claim competent to a widow by the law of England, *i. e.* she was not barred from claiming a dower, *i. e.* a third of the rents and profits of any estate or heritage belonging to the husband, or her paraphernalia; for these are the only legal claims that she could have made upon her survivance, and, by

The respondent put in a reclaiming petition against this interlocutor, and the Court found, "That the pursuer (Mrs. Lashley), in right of her mother, has no claim to any share of the moveable estate belonging to her father at the time

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the same rule, it is presumed she would have had her terce out of the Scots estate, in which Mr. Hog died infest; but she could have made no claim, by the law of England, for any part of his moveable or personal estate on account of the will; and, by the same law, the nearest in kin of the wife, in the event of her predecease, have no claim at all.

"By the nature, therefore, of this contract, and by the legal effect and construction which it would have been entitled to, had the question occurred in England, the present claim could not have been made effectual, as reserved entire to the wife or nearest of kin, or, in other words, they were not reserved entire by implication; or otherwise, if the question is to be judged of upon the construction of the marriage settlement, the language of which, according to Sir John Scott's opinion, seems to be just this: Mrs. Hog shall have the special provision which the contract gives her out of her own fortune, vested in trustees, or her claims of dower and paraphernalia entire, but we are unacquainted with what is called *jus relictæ* in Scotland, as belonging to the nearest in kin, and it is not the meaning of this contract to reserve this as a legal claim, or to say anything at all about it, as we do not know that such a right exists.

"It may be said, the question is not, whether this claim is reserved, but whether it is cut off; because, if it cannot be made out that it is expressly or virtually cut off, the law itself will reserve it as matter of course, in the same way as the legitim, and not being cut off either expressly or virtually, whether it was held to be entire, though in fact the marriage settlement contains a certain provision upon the children.

"The difficulty of the question lies here; and it is argued with some plausibility, that the case of the widow cannot be distinguished from that of the children, for that the legitim arises out of the communion of goods, in the same way as the *jus relictæ* does, being the result of that division which the law makes at the dissolution of the marriage, though the children's claim is suspended till the death of the father, as he is entitled to the use and administration of their share of his effects during his life.

"In the former question concerning the legitim, little or nothing was said upon the effect of the marriage settlement to bar the claim. The whole argument turned upon the effect of the will, which was found not to be sufficient. It was likewise considered as a question of succession, and the result of the judgment was, that Mr. Hog's personal succession fell to be regulated by the law of Scotland, the place of his domicile; as likewise all claims upon that succession,

1804. " of her mother's death, and therefore repel the said claim,
 LASHLEY, &c. " assolzie the defender from the conclusions of the libel
 v. " and decern." And, of this date, they adhered to their
 HOG. " interlocutor of date 25th Nov. 1794, finding that the de
 June 25, 1795.

which could not be effectually barred by a latter will and testamen~~t~~
 but the present question arises upon a claim, which, if it existed ~~a~~
 all, certainly existed during Mr. Hog's life, and could have been
 made effectual against him, at the death of his wife, as a debt. It ~~is~~
 not therefore a question of succession, but a claim of debt. But
 still it is a claim arising out of the communion of goods, and it ~~is~~
 difficult to maintain, that if the right in the goods which eventually
 took place by the law of Scotland, were not barred *quoad* the child-
 ren, they were nevertheless barred as to the wife and her nearest in
 kin.

- Mor. 2278. " Perhaps more full opinions of English counsel ought to be ob-
 tained from England, as the opinions referred to do not go precisely
 to the point. The case of M'Kinnon and M'Donald, (24th Feb. 1763,
 Dict. vol. iii. p. 75,) was decided upon principles which go far to
 Mor. 6457. regulate this case, and the case of Dalton v. Riddell, 28th Nov.
 1781.

" The question concerning the legitim was different. The legitim
 is truly a right of succession, and does not properly arise out of the
 communion of goods. It is an interest which the law gives to child-
 ren transmissible *ipso jure*, but still of the nature of a succession,
 subject to the father's onerous debts, and not arising till his death.
 The wife's share may be made effectual against him during his life
 as a right of property creating a debt to her nearest in kin.

" But, in the present case, she has got her share by covenant, viz.,
 the disposal of the greatest part of the fortune which came by her-
 self, and which Mrs. Hog left to her eldest son, but might have left
 to any of her children, or might have allowed it to be taken by them
 as her nearest of kin. The wife may dispose of an interest in move-
 ables by testament. She had a right to do so in this case, by the
 contract itself. By the nature of that contract, she accepted of the
 provision as a full compensation for any eventual interest that she
 or her nearest in kin might have in the moveable estate; for although
 one of the English counsel says that the dower was not thereby bar-
 red, it is not supposed that he meant to say the same thing as to the
 claim of thirds out of the personal estate, in the event of her surviv-
 ing; and, at any rate, he certainly did not mean that her nearest in
 kin had any claim remaining to them out of the personal estate in
 the event of her predeceasing."

LORD HENDERLAND.—" A change of domicile is not to be pre-
 sumed. Yet a man may have two domiciles. Mr. Hog's principal
 residence was in London; and was in Scotland only at stated times,
agri colendi causus."

“ceased Mr. Hog, at the dissolution of his marriage, had 1804.
 “his domicile in Scotland; and remit to the Lord Ordinary
 “to proceed accordingly, and to do farther as he shall LASHLEY, &c.
 “suggest.” v.
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The appellant put in a petition against this interlocutor, July 7, 1795.
 but the Court adhered.

On the second branch of the case, (namely, the amount of the fund out of which legitim is due), four questions arose, 1. Whether certain shares of stock of the Bank of Scotland, although standing in the respondent's name at his father's death, were not to be held as his father's property at that period? 2. Whether the respondent was a creditor upon

LORD JUSTICE CLERK (M^CQUEEN).—“The English opinion seems to be right as to the legal claims not being barred. As to the domicile, a man may have two domiciles to a certain effect, viz. citation. But doubt if he can have two domiciles as to regulating his succession.”

PRESIDENT CAMPBELL.—“I am for adhering upon the question of law respecting the effect of the marriage settlement; but I think Scotland was the domicile.”

LORD ESKGROVE.—“I think this claim is barred. The legitim stood on a different footing.”

LORD JUSTICE CLERK (M^CQUEEN).—“The general rule is by *provisio hominis tollit provisionem legis*. Besides, I think the *jus relicte* cannot be barred by implication, though circumstances will vary this rule; but it is unnecessary to inquire what the case might have been if no contract had been made. Here we have a contract, and must inquire, not only what is expressed, but what is *implied*. The rights of parties are ascertained by the covenant, and the law of England must determine the effect of that contract. Supposing the marriage had been dissolved within a year and a day, would she have nothing because this is the law of Scotland? Had she survived, she would have been entitled to the terce of the estate of Newliston, if Sir John Scott's opinion be right. As to the legitim, it is not similar. The marriage articles contained no general settlement of the succession; but only regulated the interests of husband and wife. Legitim is a right of succession to the children. As to the transmitting without making up titles, in one shape it does so transmit; but this is because a *jus crediti* arises to the children, against the heir or other person to whom they are left. But suppose the father dies intestate, and the funds are in the shape of outstanding debts due to the defunct, there must be a confirmation to force the debtors to pay.”

LORD CRAIG.—“Of same opinion.”

LORD DUNSINNAN.—“Of same opinion.”

Vide President Campbell's Session Papers, vol. 78.

1804. his father's funds for the sum of £2604. 5s., as the price of the estate, near Kingston, left to him in fee by his mother, but sold by Mr. Hog, the liferenter, and also for the sum of £1000, being the portion of the respondent's wife, which was put into the hands of Mr. Roger Hog, who granted a bond for it to the respondent, and his wife in liferent, and their children in fee? 3. Whether the respondent is entitled to a deduction of the expense incurred by him in obtaining a confirmation in Scotland, and a probation in England of his father's will? 4. Whether the sum advanced by Mr. Hog in his lifetime to the appellants, with interest, should be imputed as part of Mrs. Lashley's share, in calculating the amount of her legitim?

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In regard to the first point, Lord Dreghorn pronounced an interlocutor, (13th December 1791), finding "it competent for the pursuers to prove the alleged trust with regard to the thirty-nine bank shares only *scripto vel jure mento*, reserving consideration of the question, how far there is not already sufficient evidence of the trust, and allows the pursuers to prove, *prout de jure*, any superintromissions by the defender of funds of the late Mr. Hog, besides that condescended on, and allows a conjoint probation."

A proof was taken, from which it appeared, that with reference to thirty-nine shares of the bank stock, that these had been purchased by the father twenty years before his death, in his son's name, and with the special view of making him a bank director, the son giving the father a back letter, stating that these were held in trust. At the time when he was to be appointed a bank director, the son having stated that he could not take the oath that the property was his, in consequence of his back letter; the father then said that he would destroy the letter, and destroyed it accordingly, to allow him to be free to take the oath, and the son admitted this on oath. In regard to the other eighty-one shares, these had been purchased only some short time before the father's death.

Mr. Ramsay, the banker, deponed as to the eighty-one shares, that they were transferred absolutely to the son, "so that the stock became as much, and to all intents and purposes the sole property of the respondent, as if his father had given him the value in cash out of his pocket." He also deponed, that Mr. Hog afterwards told him, "that he had made a transfer of his bank stock to his son, in

“ order to prevent the possibility of its being attached as
 “ mentioned in the letters, that is, of being affected by
 “ the legitim ?”

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But it further appeared, in regard to some of the bank stock, the deceased had all along, up to the period of his death, received the dividends, and granted discharges for the same ; and had always dealt with the whole stock as his own, in making up states of his affairs in his books.

“ The Lord Ordinary having considered these minutes of de- May 23, 1798.

“ bate, finds, *primo*, That 120 shares of stock of the Bank of
 “ Scotland, transferred to and vested in the defender (re-
 “ spondent), by the late Roger Hog of Newliston, anterior to
 “ the death of the late Roger Hog, are not subject to the pur-
 “ suer’s claim of legitim. *Secundo*, finds, That the late
 “ Roger Hog, by a general settlement, of date 5th February
 “ 1787, disposed his estate, heritable and moveable, to the
 “ defender, his eldest son ; and that he appears at one
 “ time to have intended to vest his property in Bank of
 “ Scotland stock, in trust, to be laid out in the purchase of
 “ lands, to be entailed upon the defender, though he after-
 “ wards changed his mind, and transferred the same directly
 “ and *inter vivos* to the defender ; finds, therefore, that in
 “ the circumstances of this case, there is no room for the
 “ presumption of law *debitor non presumitur donare* ; and
 “ that the defender, in competition with those claiming a right
 “ of legitim, is entitled, at the period of his father’s death, to
 “ state himself a creditor upon the moveable estate left by his
 “ father, for the price of the estate near Kingston in Eng-
 “ land, which belonged to the late Mrs. Hog, and left by
 “ her to the defender, and which price was uplifted and
 “ unaccounted for by the late Roger Hog ; and that he is
 “ likewise a creditor at the period of his father’s death for the
 “ sum of £1000 sterling, contained in a principal bond granted
 “ by the said Roger Hog to the defender and his wife,
 “ Lady Mary Hog, in conjunct fee and liferent, and to the
 “ children of the marriage in fee, being the tocher which
 “ the defender received with his wife, and which was lent
 “ in these terms to the late Roger Hog ; and finds, That
 “ the said bond, and the price of the said ENGLISH estate,
 “ as well as the other debts resting by the said Roger Hog
 “ at his death, must, in the first place, be deducted from the
 “ moveable estate of the said Roger Hog ; and that the
 “ claim of legitim can only attach upon the remainder of
 “ said moveable estate. *Tertio*, Finds, that the ordinary

1804. " expense of obtaining confirmation in Scotland, or of ob-
 taining a probate in England by the defender, in order to
 LASHLEY, &c. " carry into effect the late Roger Hog's will, being expenses
 v. " which arose subsequent to the existence of the pursuer's
 HOG. " right of legitim, cannot be a deduction from or burden
 " upon the late Roger Hog's moveable estate, in computing
 " the extent of the said claim, reserving to the defender to
 " state in the present accounting, and before the account-
 " ant, any liquid ground of debt which he may have, by
 " decreet of any Court, for expenses against the pursuers
 " and the pursuers their objection. *Quarto*, Finds, that
 " is *res hactenus judicata* in this cause, that the pursuer
 " cannot claim both the voluntary provisions settled upon
 " her by her father, and also her legitim, by interlocutor of
 " date the 11th day of March 1790, acquiesced in by the
 " pursuer (Mrs. Lashley); and if the point was still open
 " it is impossible that she can, when insisting on her right
 " of legitim, as she now does, lay claim to any part of the
 " provisions granted to her by her father, which were qua-
 " lified with the condition, that the acceptance thereof
 " should be in full of the claim of legitim; and, therefore,
 " finds, That such sums as were paid or advanced, by the
 " late Roger Hog, to the pursuer, and her husband, in part,
 " and to account for the provision of £1500 sterling, which
 " he intended for the pursuer, must be deducted in the
 " present accounting, with interest from the respective
 " dates of such payments, from the said pursuer's share of
 " legitim; finds, in like manner, That such sums as were
 " paid or advanced by the late Roger Hog to his son, Alex-
 " ander Hog, must, in like manner, be deducted in the
 " present accounting from the said Alexander's share of
 " legitim, and remits to Mr. John Buchan, accountant in
 " Edinburgh, to make up a state of the funds of the late
 " Roger Hog, subject to the claim of legitim, and of the
 " amount of the sums due respectively to Mrs. Lashley and
 " her husband, and to those in the right of Alexander Hog,
 " and to report the same to the Lord Ordinary."

Four several representations against this interlocutor were
 June 8, 1798. refused. And, on reclaiming petition to the Court, the
 —26, — Lords found, "that the sums paid by Roger Hog to his
 July 11, — children, Alexander Hog and Mrs. Lashley, to account of
 Nov. 12, 1799. " their provisions, with interest thereof from their respec-
 May 14, 1800. " tive dates of payment, must be considered as debts due
 " to the moveable estate, subject to the legitim, but that

“ the said sums due by them respectively, are to be de-
 “ ducted out of their respective shares of legitim; and of
 “ consent of the defender, find, that interest is not to be
 “ charged upon the annual payments to Mrs. Lashley of
 “ £65 a year; and, with these alterations, adhere to the
 “ interlocutors of the Lord Ordinary reclaimed against.”* July 26, 1800.

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The appellants presented a bill of suspension *pro forma*, which was refused.

The appellants brought an appeal against the above interlocutors, 2nd July 1793, 5th March and 25th November 1794, 16th June and 7th July 1795, 13th December 1791, 23d May and 26th June, and 11th July 1798, 12th November 1799, and 14th May and 26th July 1800, the present appeal has been brought.

And Mr. Hog, in an appeal put in for him, which the appellants consider to be in the nature of a cross appeal, prays a reversal of the interlocutor 2nd July and 14th November 1793, 5th March, 25th November, and 9th December 1794, and 25th June 1795, may be altered, in so far as they find

* THE LORD PRESIDENT CAMPBELL said,—“ The first point here is as to the bank shares. The case of Major Agnew’s settlement throws light on this question. As to the thirty-nine shares of stock, the fact seems to be clear that they were transferred absolutely to the respondent, for the real purpose of making him a bank proprietor and director, long before his father’s death, and without any view to succession at all. As to the eighty-one shares, they were transferred a short time before his death, but while he was in *liege poustie*, and it is scarcely relevant to say, that he meant to dis-appoint the legitim. A father, when in *liege poustie*, may lawfully arrange his affairs so as not to leave any claim of legitim open, *e. g.* by lending upon bonds secluding executors. He has very ample powers over the goods in communion.

“ The second point is with reference to the two debts of £1000 each, due by the son (Alexander) to the father. On this head, I think the interlocutor right, and there is no room for presumption.

“ As to the third and fourth points, namely, collation. The parties seem to be agreed as to the principle, namely, that these advances must be brought back so as to increase the whole executry, they being truly debts due to the executors; and then, when the amount of the petitioner’s legal claim is ascertained, deduction must be allowed of what he has got already. As to the annual payments of £65 Mr. Hog was in use to make to Mrs. Lashley, it is difficult to make any disputation about it.”

1804. that the deceased Roger Hog, at the dissolution of his marriage, had his domicile in Scotland; and that the also above recited interlocutor of the 23d of May 1798 may be altered, in so far as it finds that the expenses of obtaining confirmation in Scotland, or a probate in England, by Mr. Hog, cannot be deducted from the moveable estate.

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Pleaded for the Appellant (Mrs. Lashley).—As to the claim for a share of the executry, in right of her mother, at the dissolution of the marriage, it is clear that the rights of parties, as at that date, must be regulated by the law of the country where they were then domiciled, because not only their patrimonial interests, but their *status* during the subsistence of marriage, may have been affected by that law. There is no foundation for the opinion that the distribution of property which takes place at the dissolution of the marriage depends upon an implied contract between the parties when the contract was entered into; on the contrary, that distribution seems to arise from the mere act of the law peculiar to the domicile at the time. But, admitting this rule of implied contract to be well founded, the removal of a married pair from one domicile to another, creates a presumption that they thereby tacitly consent to alter the laws by which the distribution is to be made, especially when a probable change of domicile was foreseen at the marriage. There is no reason to suppose that a husband will fraudulently evacuate a wife's rights by a change of domicile, because the law of every civilized country would interfere to redress the injury. At any rate, that case is the converse of the present, where a wife, changing her domicile to gratify her husband, is excluded from participation of advantages peculiar to the jurisdiction within which he has chosen that she should reside.

Neither authority nor precedent is pointed out to justify the Courts in Scotland, in regulating the interests of parties domiciled there at the dissolution of marriage, to determine these by a foreign law. It has been decided in this case, that children of a marriage contracted in England, but dissolved in Scotland, and who werethemselves born in England, became entitled, by their father's change of domicile, to the provisions of the Scotch law in regard to legitim; and there is no solid distinction in this respect between legal provisions in favour of the wife, and those in favour of her children. Besides, there is no express covenant in the marriage articles which would have excluded Mrs. Hog from her *jus relictæ*, if they had been entered

into out of Scotland, nor from receiving a share of her husband's personal property if the marriage had been dissolved in England; and, of consequence, these articles cannot be interpreted less favourably on account of her change of domicile.

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As to the amount of the legitim, the respondent is not entitled to claim deduction therefrom of the bank stock, as there is no evidence that Mr. Hog transferred the actual property of any such stock to the respondent. The respondent's trust acknowledgment, which he admits on oath to have granted, applied to 39 shares at least, standing in his name, and this is not proved to have been cancelled. Mr. Hog's books, and accounts of his brokers, show that he originally paid for these 39 shares; that he always considered them as his own, and that he exercised various acts of ownership and property over them, particularly in drawing the dividends which they yielded, to the period of his death. It is proved by the clause in Mr. Hog's settlement, releasing the respondent from the trust obligation, and by his subsequent disposition to trustees, mentioned in the deposition of Mr. Ramsay, which was afterwards cancelled, that they belonged to Mr. Hog. The direct evidence therefore obtained, in regard to the 39 shares, creates a presumption that the transfer of the remaining 81 were equally fictitious, and made to defraud the legitim; and that presumption is converted into proof by the deposition of Mr. Ramsay; and in regard to the price of the Kingston estate, this, as appears from his father's books, although uplifted by his father, was again repaid to him in his father's lifetime.

On the cross appeal. By your Lordships' standing order of the 8th March 1763, it is ordered that a cross appeal shall not be received, unless it be presented within one week after the answer put in to the original appeal. The respondent put in his answer on 4th December 1800, and his appeal, (which must be considered as of the nature of a cross appeal), was not presented till 4th Feb. 1801; and, of course, not in due time, and that appeal, therefore, is incompetent. But, upon the question of domicile at the death of Mrs. Hog, to which it relates, Mr. Hog was domiciled in Scotland at the dissolution of the marriage, because he resided there at that time, had generally resided there for several years before, and did generally reside there afterwards, till the period of his death. His express intention of leaving England, and making Scotland his permanent home, is proved by all his letters, both before and after he

1804. left England, and always give it exclusively the appellation
 of his final home. His land estate was there—his family ther—
 LASHLEY, &c. —and he had sold his residence in England, and devolved
 v. his business there on a partner. As to the expense of con-
 HOG. firmation, Mrs. Lashley cannot be liable for this, because she
 does not claim or take under the will.

Pleaded for the Respondent.—On the cross appeal. 1. In considering the question where Roger Hog was domiciled at his wife's death? your Lordships will be pleased to keep in view, that Roger Hog's domicile was once clearly fixed at London; and the question is, Have the respondents proved that he had changed his domicile before his wife's death, by abandoning and relinquishing his former domicile in London, and fixing a new domicile in Scotland in its place, as his sole or principal domicile? A domicile once established, may indeed be changed, but the change will not be presumed, and the domicile remains where it was once fixed, till there is proof of a clear indisputable change. "Non in dubio presumenda domicilii mutatio sic ut eam allegans tanquam rem facti probare teneatur." 2. In considering therefore the alleged change of domicile from London to Scotland, the definition of the domicile given in the Code will be attended to "Et in eodem loco singulos habere domicilium non ambigetur ubi quis larem rerumque ac fortunarum suarum summam constituit, inde (rursus) not sit decessurus si nihil avocet, unde cum profectus est peregrinari videtur, quod si rediit peregrinare jam destitit." Roger Hog's purchase of Newliston cannot be said to constitute a change of domicile. A person residing in London may purchase lands, in a remote county in England, in Scotland, Ireland, the West Indies, or America, without any intention of changing, far less any actual change of his domicile. In like manner one, for the sake of health or amusement, may reside occasionally at any estate which he has purchased, without intention of such a change. But if a merchant makes such a purchase, or has such an occasional residence in the country, retains his business in London, and lives sometimes there, for the prosecution of that business, the presumption against an intention to change becomes surely much greater. During all his excursions to Scotland betwixt 1753 and 1760, Mr. Hog had not only his counting house and trade, but also his dwelling house in London, to which he and his wife always returned; and though he stayed at one time about two years, and at another fifteen months at his country seat in Scotland, it was, as he states himself, partly for

Voet, vol. i. p.
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health, and partly for the purpose of superintending the education of his sons, whom he chose to educate in that country. An occasional residence in the country for health will not make a domicile. In like manner, it is well understood in law, that a student does not change his domicile by his residence at a college or other place of education; and it would be somewhat extraordinary if the domicile of his father should be held to be changed, because, from some paternal affection, or sense of duty, he may have accompanied his children for a time.

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When Mr. Hog and his wife made their jaunts to Scotland, he was little turned of forty years of age, which is a period of life at which people would not think of relinquishing a successful business, or domiciliating themselves in a country incompatible with their business, especially with a young family, as Mr. Hog had; and during these jaunts to Scotland, he was equally concerned in his house at London as if he had been upon the spot. During his absence he was informed of all that was going on. Abstracts of the transactions of the house were transmitted to him; and from his letter book it appears he regularly gave his opinion and advice in regard to the business of the London house, as if he had been on the spot.

When he went back to London in November 1758, he himself declared that he did so with a fixed intention, not only of carrying on the transactions and business of his house at London, but of supporting that house for a series of years. Bad health again obliged him to retire to the country in autumn 1759, but, had he recovered his health in 1760, there can be little doubt that he would then have applied himself to business in London as formerly; and although he continued infirm, and incapable of giving the same application to business as formerly, still he left Scotland in 1760, and spent almost the whole of several subsequent years in England.

From the letters quoted, it is evident that the jaunt to Scotland, at the period of Mrs. Hog's death, which happened on the 16th of Feb. 1760, was principally owing to Mr. Hog's state of health; that his views were to place his second son, then a boy, in the house in London; and if he had any thoughts of retiring at a future period, still he was, at any rate, resolved not to do so till he had established his son in the house as his successor. It is further clearly instructed from the same letters, that at this period, in place

1804. of having any thoughts of being domiciled in Scotland, ^o
 retiring from London, and giving up his house, he was ^{de}
 LASHLEY, &c. terminated to retain that house for the seven years of ^{his}
 v. lease that were to run; and, in consequence of that ^{house}
 HOG. being held and understood to be his place of residence, ^{he}
 was actually elected *constable of the ward* to which it be-
 longed, and compelled either to serve himself or by a depu-
 ty, which is totally incompatible with the idea of his being
 at this time domiciled in Scotland. This last, indeed, is a
 most decisive circumstance, for the submitting to burdens
 and offices is the very criterion of domiciliation. The pre-
 sent question being, Whether Mr. Hog was domiciled in
 Scotland at his wife's death in 1760? the circumstance of
 his becoming afterwards unquestionably domiciled there
 ought not to have the smallest influence upon it; and yet
 this circumstance is apt to mislead, and perhaps it has serv-
 ed more than any thing else to give some colour to Mrs.
 Lashley's argument.

But let us suppose he had died at London, or any where
 else in England, in the year 1761, or in any year between
 the year 1760 and the year 1765, when he first brought down
 his daughters to Scotland, and began to make a fixed residence
 at Newliston, and that the question had then arisen, Where
 was Mr. Hog's domicile? the appellant (in the cross appeal)
 apprehends that, without a doubt, the answer must have been
 that he was domiciled at London; and if this was the true
 answer then, it must be so now. As his known and ordina-
 ry domicile had been so long in London, and his dwelling
 house and business were *still there*, it would, with submis-
 sion, have been impossible to maintain in 1760, that any
 thing had happened that could alter his domicile, or esta-
 blish a Scotch domicile in its place, more especially when
 he was seen leaving Scotland and returning to England,
 where he remained several years after this period.

A letter has been founded on, addressed to his brother
 Alexander in 1752, showing that even at that time he had
 an inclination to retire to Scotland; but this only goes to
 show a predilection for his own native country, but nothing
 more. But an intention of ultimately coming to settle in
 Scotland in his old age, or when retired from business, does
 not interfere with or prevent his continuing domiciled in
 England in the meantime. And it was clearly laid down by
 your Lordships, in the late case of *Bruce v. Bruce*, that a
 person going out to India, and settling there only for a few

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years, with the view of making his fortune and returning home, does not possess the original domicile to which he intends to return, but has his domicile in India in the meantime, notwithstanding the most clear intention of ultimately leaving that country and returning to Britain.

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In answer to the original appeal, the respondent argued, (as to the appellant's claim in right of Mrs. Hog, for a share of the goods in communion on her death), That in the reasons in the cross appeal, he had endeavoured to show that Roger Hog was domiciled in London when his wife died; but, supposing a different opinion should be held, yet the respondent apprehends, that as the marriage of Roger Hog was contracted in England, and written marriage articles entered into, the appellant's claim must be regulated by the law of England; because, 1st, When a man and woman enter into marriage without a written contract, their rights must be regulated by the law of the country where they were domiciled at the time of the marriage. The legal matrimonial contract is of force, 1st, *vi legis*; and, 2dly, by the implied consent of the parties, who must be held tacitly to agree to all those conditions and consequences which the law of the country has made to follow upon their consent to the marriage itself. If the law of the domicile, at the time of contracting the marriage, makes the communion of goods an implied part of this contract, then it takes place by tacit consent; and, on the other hand, if by the law under which they entered into marriage, there is no communion of goods, but certain other rights of a different nature are held to arise upon the marriage, then they tacitly agree that there shall be no communion of goods, and that those other rights shall take place.

By the law of Scotland, there arises, upon marriage betwixt parties domiciled there, a communion of goods, in virtue of which the husband, on the one hand, acquires right to the whole personal property of the wife *jure mariti*, and the wife, on her part, acquires such an interest in the goods in communion, that she or her executors have right, at the dissolution of the marriage, to a third or a half, according as there are children of the marriage or not.

By the law of England, there is no communion of goods, and the wife acquires no interest in the personal property of the husband; and, accordingly, neither she nor her nearest of kin, have a legal claim to any share of the husband's personal property upon the dissolution of the marriage. The *jus mariti* in England is also very different from what

1804. it is in Scotland, being more extensive in some respects, and narrower in others. Thus, debts upon bonds, contracts, and the like, are vested, by the law of England, so imperfectly in the husband, that unless he recovers payment of them in his own lifetime, they do not go to executors, but remain with the wife as her own property, whereas by the law of Scotland, they are vested absolutely in the husband by the marriage itself, and go to executors, whether he has recovered payment of them or not.

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The rights of parties being thus settled by a legal, and also an implied voluntary contract, at the time of entering into the marriage, they cannot be altered by any change of domicile during the subsistence of the marriage, but the original written contract, under which the marriage was entered into, must be of force to regulate the patrimonial rights of parties in all times and places, in the same manner as a written contract would do. A change of domicile during the marriage cannot alter the patrimonial rights of the married parties for several obvious reasons. 1. The legal matrimonial contract arising from the law of the country where the parties are domiciled at the time of the marriage has already taken its effect in many particulars, and as it cannot be undone or altered *in toto*, so it cannot be altered at all, without manifest injustice. 2. By removing his domicile to England, while he keeps his wife's estate he has acquired under the law of Scotland, he might defeat the wife's claim under the same law. And, in like manner, a removal of the domicile from England to Scotland, as it ought not to have the effect of depriving the wife of outstanding debts originally due to her, which, by the law of England, remained with her notwithstanding the marriage, so neither ought it to give her a right to a third, or half of the husband's moveables, to which by the law of England she could have no title.

But the consideration of the tacit agreement of parties that their rights shall be regulated by the laws of the country where they are domiciled at the time of the marriage, leads to the same conclusion. Such an implied contract can no more be defeated by their afterwards changing their residence, than a written contract of marriage or any other contract, can be set aside, merely by the parties thereto changing their place of abode; and as the law of England, where both Mr. Hog and his wife were domiciled when they entered into the matrimonial contract, does exclude the communion of goods, and any claims by the representatives

of the wife, in the event of her predeceasing, it must operate to that effect, just as forcibly as a special covenant in a marriage contract would do; these principles, so manifestly just and conclusive, are established by the authority of Voet ad Pand. lib. 23, tit. 2, § 87, and Kames' Principles of Equity, b. 3, ch. 8, § 3, and other authorities. 3. The respondent has hitherto argued this question upon the supposition of a marriage having been made in England *without* a contract; but, in fact, not only was the marriage entered into by parties domiciled in England at the time, but marriage articles were also executed there betwixt the parties. This circumstance, in the respondent's apprehension, greatly strengthens his argument. Where parties marry in any country without a contract, as it must be presumed they wish their rights to be settled by the law of the country, so, where parties marry with a contract, it must be presumed they have the law of the country in view, both for explaining the terms of the contract and for ascertaining those rights not expressed in the contract. If the provisions settled in the contract by Mr. Hog or Mrs. Hog, did *de jure*, exclude her from the legal provisions due to a wife by the law of England, it must be presumed that this was the meaning of the parties. If the reverse be the law of England, it must be presumed that the reverse was also their intention. To say, therefore, that the rights of married parties are to change with their residence, is, in other words, to say that a change of residence breaks a marriage contract. If a change does take place, such contracts must be construed and explained by the judge of the country agreeably to the laws of the country where the contract was entered into.

1. The first question as to the *extent* of the *legitim*, respects the claim for 120 shares of the bank stock, which Mrs. Lashley contends were the property of the late Mr. Hog till his death. Of these 120 shares, 39 were transferred to the respondent a number of years before his father's death, and the 81 were transferred by the father to him a few months before he died. In the argument, the appellant has distinguished betwixt these two classes; and although they contend there was no transference of the 120 shares, yet they argue that their plea is much stronger with regard to the 39 shares than the 81 shares. But, concerning the 39 shares of stock nothing has been proved to shake the absolute transference of these; far less has it been proved, what was attempted, that this transference by the father to his eldest son Thomas, the respondent, was only in trust.

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1804. Letters of diligence and exhibits were taken out. They endeavoured to recover back letters, or back bonds to establish this trust, winding up the evidence with the respondent's oath, which declared, "that about twenty years ago the deponent's father purchased some shares in the Bank of Scotland, and which were transferred to the deponent; and sometime afterwards he gave a letter to his father, the exact words of which he does not recollect, nor the number of shares to which it related; but, in general, it imported that these shares were to be considered as his father's." And further, on occasion of his election as a director, upon telling his father that, in consequence of said letter, he could not take the oath as a proprietor,—whereupon his father said "that he should have a complete right to the said shares, and added that he would *cancel* the letter."—"In consequence of which he took the oath, and has been elected as a director annually ever since." The trust, therefore, if it was ever constituted, has been effectually evacuated in the manner described by the cancellation of the letter, as to which there is not the smallest doubt of the fact. And it is a mere mistake to say that Mr. Hog, after this, continued to uplift the dividends on these shares. The stock was registered in his name, and, of course, the dividends could only be received upon written orders under his hand. With respect to the 81 shares transferred by his father to him a few months before his death, in the most absolute and unqualified manner, it is admitted that the arguments applicable to the 39 shares do not apply to them, so that these stand free from all such argument as has been maintained against the 39 shares. 2. In regard to the second branch of the interlocutor under appeal, regarding the price of the estate of Kingston in England, which was vested in the respondent, but afterwards sold by his father, and the price appropriated by him, and a bond on £1000, the respondent contends they are both of them debts due by the late Mr. Hog, and, of course, must be deducted in calculating the amount of his executry, and the claim of legitim can only attach upon the residue. Nor is it any answer to say, that if the transfer of the bank stock is to be held effectual in favour of the respondent, it ought at same time to operate as an extinction of the debts due to him, upon the principle *debitor non presumitur donare*; but the interlocutor has rightly found "that, in the circumstances of this case," the presumption does not take place, because that presumption yields to other facts and circumstances

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supporting a stronger contrary presumption. 3. Deduction ought also to be allowed for the expense of probate in England and confirmation in Scotland. 4. In like manner, deduction ought also to be given of the payments made to Mrs. Lashley to account of her provisions, as well as of the annual payments of £65, which was paid to Mrs. Lashley as the interest of the balance of her provision.

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After hearing counsel, in June 1802, for five days,

The Lord Chancellor adjourned the further consideration of the case until the next session (1803). In session 1803, it was again adjourned until session 1804, when it was finally disposed of.

THE LORD CHANCELLOR (ELDON) said :—*

“ MY LORDS,

“ This is an appeal by Rebecca Hog, otherwise Lashley, and Thomas Lashley, Esq., her husband, against several interlocutors of the Court of Session, of the 2d of July 1793, the 5th of March and 25th of November 1794, the 16th of June and 7th of July 1795, the 13th of December 1791, the 23d of May, the 8th of June, the 26th of June, and the 11th of July 1798, the 12th of November 1799, and the 14th of May, and the 26th of July 1800. And also an application to your Lordships, on the part of Mr. Hog, in the nature of a cross appeal, against the interlocutors in the course of the same proceeding. That cross appeal comprehends questions which I shall presently state, because, before it can be taken into consideration, your Lordships will have to decide whether it was presented consistently with the rules of your Lordships’ House, and that question, though it will not much affect the principal matter in the case, will certainly affect one part of it, that which relates to a claim with reference to the expenses of confirmation in Scotland, and probate of the testator’s will in England.

“ This cause comprehends a great variety of questions, including many points deserving of very great attention, which have been very eloquently argued at your Lordships’ bar. My purpose, if that shall meet with the pleasure of your Lordships, is to go through the statement of the case, and to exhaust the consideration of some of the points now, meaning to conclude the consideration of the whole in the course of to-morrow.

“ The case, with reference to the questions between these parties, has been long, upon some points or other. under discussion in your Lordships’ House, so long, that I have had the honour frequently of appearing at your Lordships’ bar, as counsel for one of the parties in this cause. It has been, therefore, certainly with great reluctance that my attention, in a judicial character, has been called so im-

* From Mr. Gurney’s Short-hand notes.

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periously to the consideration of the questions between these parties. But the circumstance of the absence of one noble and learned Lord not now present, and the circumstance of the occasional absence of another noble and learned Lord, whom I am happy to see this day present in this House, have compelled me to execute that duty as well as I can ; which I never feel any inclination, under such circumstances, to attempt to discharge when it is not necessary that I should take the discharge of it upon myself. Thus I address myself to the decision of this cause, rather from matter of necessity than matter of choice. In the opinion, however, which I have formed upon this subject, I have reason to think that I have the concurrence of those who have had occasion, in different periods, to attend to the subject matter of this cause, and who, whether present or absent, have in that degree attended to the consideration of this case, which enables me to collect (what is of very great value unquestionably,) the judicial opinion of those who may possibly be not here to express it ;—and I shall have the satisfaction, in expressing my own opinion in the presence of a noble and learned Lord, who has frequently had occasion to give his attention to this subject, and who, if I fall into any mistake, will be able to set your Lordships right.

“ It appears, that previous to the year 1737, a gentleman of the name of Roger Hog, who married in that year a lady of the name of Rachael Missing, and who were the father and mother of the appellant Mrs. Rebecca Lashley, and the respondent Mr. Hog, lived in that part of this island which is called England. Mr. Hog carried on his trade in the city of London. He was a native of Scotland, but he had unquestionably lost his Scotch domicile. He was to all intents and purposes a domiciled Englishman when he contracted, in 1737, in England a marriage with this lady. Upon that marriage, a settlement was made, and it is necessary to state particularly to your Lordships the substance of that settlement ; because it has been considered as affecting the questions in this case, both in the Courts below, and the arguments here at the bar ; and because it appears to me, upon the best consideration I can give the subject that, attending to the legal effect of it, it does not in any degree affect the legal consideration of this case.

“ Mr. Hog received with the lady a portion of £3500 ; and, receiving that portion, he entered into an engagement that he would, as soon as a purchase could reasonably be had, dispose of the sum of £2500, part of the £3500, in the purchase of a real estate in England, with an obligation to convey that estate to his own use for his life, and, after his death, to trustees, to preserve contingent remainders, with remainder to the use of his intended wife, for her life, and after the decease of himself and his wife, then, to the children of the marriage, in such manner as she, notwithstanding her coverture, by deed or will should direct and appoint, and, in default of such direction and appointment, to the use of the children of the marriage, to

be equally divided between them, share and share alike, and, in default of such issue, to the use of the lady in fee.

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“ In looking through this settlement, a copy of which is presented in the cause, I think I am authorized to state to your Lordships, that its effect is no more than this,—that this lady, being entitled to the sum of £3500,—£1000, part of the £3500, was advanced to the husband for his own use ;—that with respect to the remaining £2500, it was to be laid out in land, which land was to be settled to the use of the husband for life, then to the use of the wife for life, with remainder to the children of the wife, whose money your Lordships observe purchased the estate, and therefore power was reserved to her to dispose of the same, in such manner as she should appoint ;—that, in default of any appointment by her, the children were to take equally, and, if there were no children, the real estate so purchased with £2500 of her personal property, was to go to her in fee. But the settlement does not contain any declaration whatever that this was to be in lieu of her dower ; and indeed it would have been singular if it had, for this was the purchase of her own estate, with her own money. What is more to the present purpose, it does not contain anything, by way of declaration, covenant, or otherwise, that this was to be accepted in satisfaction of any right of any kind which she could acquire by her marriage, or otherwise, in the personal estate of her husband. It is a pure dry settlement of that real estate, which was to be purchased with the sum of £2500 ; and it appears to me, if I am right in collecting and stating the effect of this settlement, that, in respect to any question as to what, under any circumstances, this lady would have in the personal estate of her husband, that question remains just as much open to discussion as if this settlement had never been made,—this settlement has no relation whatever to that question.

“ It appears, that after this, Mr. Roger Hog purchased lands at Kingston, upon the terms of this covenant ; and those lands were conveyed to the trustees mentioned in this deed, to the uses of the deed, and it should seem, that afterwards the lady made her appointment, by which she gave, subject to her husband's estate for life, as she had a power of doing, the right of the land to the present respondent, Mr. Thomas Hog. It appears, afterwards, that when he became of age, (at least it is so suggested, and seems to have been so taken for granted throughout the whole of the proceedings in the cause), this estate was sold, and the estate being sold, the father received the money, the price of the estate ; and the father receiving the money, the price of the estate, of course he would be debtor to the son, whose estate it was, for the price of the estate, to be paid to the son at the time his right to the possession of the estate so sold should have commenced ; and that the son would therefore be a creditor upon the assets of his father for that sum, calculated as a sum to be paid at that time, unless it can be shown, either that by virtue of

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some agreement which had been entered into between the parties, this relation of debtor and creditor so entered into was cancelled, or that, by some circumstances which had taken place between them, this debt was paid ; or that, from the effect of some transaction which has taken place upon the death of Mr. Roger Hog, or otherwise, this demand has been satisfied.

“ Mr. Hog continued to carry on trade for a considerable time, and, carrying on that trade, it appears that he purchased an estate at Newliston in Scotland in 1752, and, it is alleged on the part of the present appellants, the original appellants, that he had his residence in Scotland from about the year 1752. Mr. Hog, the son, on the other hand, contends, that he was after that time domiciled in England ; and that question will be material for your Lordships' consideration, at what time he ceased to be, in the contemplation of law, domiciled in England, and at what time he began to be capable of being considered, and necessarily to be considered, as domiciled in Scotland, with reference more particularly to the period of February 1760 ; because, in February 1760 Mrs. Hog, formerly Miss Missing, died.

“ The question, upon the place of domicile at that period, comes to be material, because, upon the fact, whether he was domiciled in Scotland or domiciled in England, at that time, arises a very material question between the parties in this cause ; whether she is to be considered as the wife of a Scotchman, or whether she is to be considered the wife of an Englishman ? it being contended, on the part of Mrs. Lashley, that her mother was to be considered in 1760, as the wife of a Scotchman, of a domiciled Scotchman. The consequence of that is, that if she was the wife of a domiciled Scotchman, she was entitled, predeceasing her husband, to what they call *jus relictæ*,* that the husband could not deprive her of, but that she had that claim, and transmitted it to her next of kin. The appellants in this case, say that she was associated with her husband, and entitled to a share under the communion of goods with him, because he was a domiciled Scotchman, because the law of Scotland creates such an interest in the case of a domiciled Scotchman, his wife predeceasing him, and therefore Mrs. Lashley, as one of the children, claims to be entitled, according to her interest in that which, according to the law at the dissolution of that connection, goes to the children of the deceased wife.

“ On the other hand, it is said in the cross appeal, (if it can be considered as such), that there is no fact which bears them out in the

* Strictly speaking, the “ *jus relictæ* ” is the claim arising to the surviving wife, on the predecease of her husband. The claim here was the share of the goods in communion falling to her on the dissolution of the marriage by her predecease, called dead's part, or wife's third, and claimed in right of the mother by her children. But the term *jus relictæ* was applied here in this case by the most eminent lawyers.

assertion, that Mr. Hog was domiciled in Scotland in 1760, and if they are not supported in the fact that he was domiciled in Scotland in 1760, that there is no occasion to inquire farther about the law.

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“ But they add, if he was domiciled in the year 1760 in Scotland, yet they contend, 1. That because the marriage was had in England, the Scotch law, which would obtain between Scotch persons domiciled at the death of the wife in Scotland, when the marriage has *de facto* taken place in Scotland, will not apply to persons, though they are proved to have been domiciled in Scotland at the dissolution of the marriage, when the *locus contractus matrimonii* was actually in England; and that by the law of Scotland you are not driven to inquire what the rights of a Scotch wife would be if she had been clothed with the character of a Scotch wife under the effect of a Scotch marriage contracted in Scotland; but if, upon the husband's death, he is to be considered as a domiciled Scotch husband, and she is to be considered as a domiciled Scotch wife,—or if, upon the wife's death, she is to be considered as a domiciled Scotch wife, and her husband as a domiciled Scotch husband, you are to apply, as between the estates of such a husband and wife, the law of England, if these parties were married in England.

“ And beyond that, they contend that, in this particular case, if *that* is not the just view of the law, that a marriage settlement having been made in England, *that* is to be regarded as a conventional provision, which would shut out the right to any legal provision.

“ It is necessary also to state to your Lordships, that the appellant, Mrs. Rebecca Hog, in the year 1776, married the other appellant, a gentleman of the name of Thomas Lashley, whose father was a physician in the island of Barbadoes, and that upon that occasion no contract of marriage was entered into between them. Mrs. Hog's father made a proposal, which did not take effect, and the appellant received from him the sum of £700, which was advanced to Mr. Lashley, upon his bond in 1767; another sum of £300 in 1779; and an annual sum of £65 from the year 1772, during the remainder of Mr. Hog's life. I state these circumstances to your Lordships because the interlocutors have relation to these facts.

“ Mr. Hog's other children received from him certain provisions, which they are said severally to have accepted in full satisfaction of all they could ask or demand by and through his decease, or the decease of their mother, in the name of legitim, or otherwise; and when I advert to this fact in passing along, it seems to me not quite immaterial, that after Mr. Hog became unquestionably a person domiciled in Scotland, and was providing for his children as a person would do, who was attending to the law of the country in which he was domiciled, his men of business, whom he consulted at the time he made these provisions, certainly felt that it was matter of doubt whether the children had not a claim under their mother,

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considering the circumstances under which their mother had died; for the deed which he expressly required before he paid to them the portion which he intended for them, contained a renunciation not only of whatever they could claim through his decease, but also of whatever they could claim through the decease of their mother in name of legitim or otherwise.

“Upon the 19th of March 1789, Mr. Hog died at Newliston, leaving a real and personal estate of very considerable value, part of which was situated in Scotland, part in England, and a small part in France. And before his death he had executed certain deeds of settlement. There can be no doubt his intention was to vest, as amply as he could, his property in his eldest son, and of this he was unquestionably himself the proper judge. He was the father of all the children, and, as far as the law would allow, he had a right to decide for himself to which of his children he would give most, and to which he would give least. It was quite clear that he meant to give all that he could give to the present respondent, Mr. Thomas Hog.

“The deeds of settlement which Mr. Hog had executed, were lodged in the hands of Mr. John Robertson, writer in Edinburgh, his ordinary agent. One of these was a general disposition containing a nomination of executors, dated the 5th of February 1787, in favour of his eldest son, the respondent. It conveyed to him certain lands therein mentioned, together with all Mr. Hog's personal property, burdened with the payment of debts, legacies, and provisions to younger children; and it directed—and this is the part of the disposition to be attended to by your Lordships—‘that the residue and growing interest should be employed in purchasing land, to be entailed on the series of heirs specified in the entail of Newliston.’ And I state this to your Lordships to be material, in deciding on the circumstances of this case, (and your Lordships will recollect, that in a former stage of it, I represented it to be material), because if, in fact, this species of disposition was made by the settlement in 1787, that will deserve attention when your Lordships come to consider the effect of the evidence, as it bears upon the question in regard to certain shares of stock of the Bank of Scotland, to the number of eighty-one shares, which were to be disposed of, or were intended to be disposed of, which eighty-one shares, it is contended by the respondent, Mr. Hog, had been absolutely conveyed to, and vested in him.

“Two bonds were also entrusted to Mr. Robertson in favour of Mrs. Lashley, excluding her husband's *jus mariti*. One of these, for £1000* sterling, contained a declaration that the same ‘shall be in full satisfaction to the said Rebecca Hog, my daughter, of all por-

* The sum mentioned in the interlocutor, quoted at page 592, ought to be £2500 instead of £1500;—thus £700 and £300 paid to Dr. Lashley, and £1500 left Mrs. Lashley at her father's death.

'tion natural, legitim, bairns' part of gear, or other claim or demand
'from me, or from my heirs and executors, in and through my de-
'cease, or the death of Mrs. Rachael Missing, my spouse.' And here
also, it may be material for your Lordships to attend to it, that these
bonds, which were executed at a period very long subsequent to that
at which her mother had died, contained a declaration that the same
should be in satisfaction of all that she could claim through his de-
cease, or the death of Mrs. Rachel Missing, his spouse. Those, there-
fore, who transacted this part of the testator's business, did not think
it safe to make this proposition, as a proposition to a child, to accept
this provision in lieu of legitim, as it could be claimed through the
decease of the father, who was unquestionably then a domiciled
Scotchman; but they thought it right also to propose it, at least as
a satisfaction for what could be claimed through the mother's de-
cease, who, as I before stated, died in the year 1760. These pro-
visions, which had been so tendered to Mr. Lashley and his wife,
they were not contented with, and they raised a suit in the Court of
Session against the present Mr. Hog, as representative of his father
(for he had acted as such in Scotland, and had taken probate also
in England), to account for one half of his father's moveables or per-
sonal estate, in name of legitim, and for Mrs. Lashley's proportion
of one-third of the goods in communion at the dissolution of the
marriage, to which they alleged the children of the marriage were
entitled, as the next of kin to their mother.

"There were several defences to this action, and these defences
were met by replies. It will be within your Lordships' recollection
that there have been several interlocutors in favour of Mr. Lashley
and his wife, which have been affirmed by your Lordships, sitting
in judgment here, more particularly an interlocutor of the 7th of
June 1791, that 'the renunciation of the claim of legitim by the
'younger children of the deceased Mr. Hog, operated in favour of the
'pursuer (Mrs. Rebecca Hog), and has the same effect as the natural
'death of the renouncer would have had; and as she is the only
'younger child who did not renounce, find her entitled to the whole
'legitim, being one-half of the free personal estate belonging to her
'father at the time of his decease, whether situated in Scotland or
'elsewhere.'

"Another question which arose in that case, was with respect
to some part of that personal property, (of what value does not
signify as to the principle which was under discussion), Whether
the *lex loci rei sitæ*, or the *lex domicilii* of the testator was to de-
termine in what manner the same should be disposed of. This
question, which long agitated the Court of Session, and afterwards
agitated your Lordships by a discussion at your bar, and which was
finally decided here was, taking Mr. Hog, as he was found to be
domiciled in Scotland at the time of his death, whether the person-
ality which he had in England and in France, particularly the per-

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sonality which he had in England, and attending to the nature of it, and the property in the funds, was personality, to be distributed according to the law of England, or to be distributed according to the law of Scotland?

"There were other points, and those were points with which the present case more particularly connects itself. It was first denied that Mrs. Lashley had any claim to her mother's right to a share of the personal estate of her father at the dissolution of the marriage. That question was remitted by the Court of Session to the Lord Ordinary for his reconsideration, before the last appeal, and I shall have occasion to state to your Lordships his judgments, and that of the Court upon it.

"Then there was another question, which becomes extremely material in this case, which is, as to the amount of that property which is to be considered as subject to the legitim; and that question chiefly respects several shares of the stock of the Bank of Scotland; and the true question upon that will be this, Whether the property in the stock of the Bank of Scotland was, at the death of Mr. Roger Hog, to be considered (for the purposes with reference to which his children can claim) as the property of Mr. Roger Hog, whoever might be in the apparent ownership of it? Or, Whether, on the other hand, it was to be considered as property, with reference to which he had, to all intents and purposes connected with the question of legitim, divested himself of all ownership, and had *bona fide*, out and out, given that property to his son Thomas Hog in his lifetime? It cannot be denied, in any way of stating the question, that the claim of legitim attaches only on that which is the moveable property of the father at his death, and therefore ceased to be the property of the father at his death. The children can claim only against that which was the property of the father at his death, subject always to the consideration of what acts can be said to have put an end to the property of the father previous to his death, regard being had to the principles of the law as these respect fraud upon fair claims, and attending to the nature of those claims.

"The first question, therefore, is, Whether, under the circumstances, Mrs. Lashley had any claim under her mother?

"The next question is, What is the amount of the property to which she has a claim? That depends also upon the question, What claim Mr. Thomas Hog has, and what right Mr. Thomas Hog has to call upon Mr. and Mrs. Lashley to bring into division, or into collation, those sums of money, and those provisions which have been advanced by the father to Mr. Lashley or to Mrs. Lashley, during the lifetime of the father. When these claims are settled, it will of course be ascertained what is the amount of that property upon which this claim of legitim attaches.

"With respect to the first of these questions, it certainly is an extremely important question, which it appears to me has been

hitherto unprejudiced by any direct decision ; but, as it seems to me, by no means unaffected by the establishment of principles which have application to it. It is this, Whether, when a person marries in one country, and on that marriage a contract is entered into, but which contract, in the terms of it, has no relation whatever to the personal property of the husband, such as it is at the time of the marriage—such as it shall be subsequent to the time of the marriage, or such as it may be at the death of the husband ; whether, because in fact the marriage took place in England, whatever may be the change of domicile of the husband subsequent to the marriage, and whatever shall be said to be in law the place of his domicile at the time of his death, the administration of his estate in that place where he dies domiciled is to be an administration, as far as it respects his wife, with reference not to the law of the place where he died domiciled, but to the law of the place where the marriage was had. And then stating that, whatever might have been the claims, if she had been married in the place where her husband died, let her husband die domiciled where he may, she neither has nor can have any other rights than those which she would have had if the husband had died domiciled in the place where the marriage was entered into.

“ This question comes to be important, because, your Lordships will observe, that there is a great difference, particularly in this case, which is the case of a predeceasing wife, between the claims of her children, and what would be the claims of her children if the rights of the mother are to be determined on by the law of Scotland or by the law of England. Under the law of England, I need not state to your Lordships, that when the wife predeceases the husband, and there has been no convention or provision upon her marriage ; when she dies, instead of any body representing her having any claim as against the husband, her husband has a title to be her universal representative against any children she had, and all other persons in the world. The law of Scotland is not so, because that law recognizes what is called the communion of goods in the married state, and, by virtue of that law, the wife has certain interests ; if she predeceases the husband, she and her husband being considered as entitled to communion and society in the personal estate, and the society and communion expiring by the dissolution of the marriage in consequence of her death, the property comes to be severed, and her children, as her children, have a right to a part of the property of the husband, as representing her, against the husband himself. The proportion, in the case of the wife dying after her husband, seems to be pretty much the same as in the law of England ; if he predeceases her in England, dying intestate, leaving children, your Lordships know her share is one-third, and the children have the other two-thirds ; if there are no children, her proportion is a moiety ; and the next of kin, not standing in the condition of children, take the other moiety. So in the law of Scotland, her right is different

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the rights of
the wife ; or
whether the
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tus matri-
monii must
govern.

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 her husband's dying with children or without children. I think, if
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"In order, therefore, to state this question to your Lordships, we must consider, 1. What would be the case, supposing the wife had died after the husband; and see how far the principles we shall establish to regulate that case will apply to the case of the wife predeceasing her husband. When it was stated at the bar here that the *locus contractus matrimonii* must govern, one's attention was naturally called to the consideration of all the difficulties that presented themselves as consequential upon that way of stating the proposition. I am ready to admit there are considerable difficulties upon any state of the proposition; and yet, to a mind informed as that of an English lawyer is, as he is informed by his habits, I own it appears to me one of the most extraordinary propositions I had ever heard, notwithstanding the passages that are found in text writers upon the subject, that it could be maintained, as an universal proposition at least, that the *locus contractus matrimonii* was to govern. It is, no doubt, one question, what is an universal proposition to be acted upon in England, Scotland, or any where else, as a principle of sound law, to be adopted every where? and another thing to say, what is to be considered as being the law of England upon the point? When one recollects what has been the universal practice in regard to the administration in this country of the effects of intestates, under all the circumstances which have obtained, under all the changes and mutations of instruments which parties make in their lifetimes, I believe it never occurred to any person who has sat in these Courts, in which they administer the estates and effects of intestates, to think of the question, *where* was the party married? in order to decide *what* was the *share* a wife was to take of her husband's personality?

"This is very familiar to us in this country, because your Lordships know very well that the distribution of the personal estate of intestates is in different proportions in different parts of England. When a person's estate, for instance, is to be distributed as the personal estate of an individual living in that district in which the custom of the province of York obtains, the wife is there entitled to five-ninths, and if the *locus contractus matrimonii* is to determine upon her rights, where there is no domicile in the province, I believe I should state a doctrine that would extremely surprise all the inhabitants of London who have transplanted themselves from the parts to which I am now alluding, if I were to tell them, if they happened to die domiciled in the province of Canterbury, where the wife's share is one-third, that it was not the circumstance of being themselves domiciled within the province of Canterbury which was to regulate this, but that the circumstance that the marriage had

been had in that part of the kingdom, on which the custom of the province of York attaches, was to decide upon it, and that it was to decide upon it with no communication, and no agreement between the parties at the time of the marriage. Upon this doctrine, the result would be, that if a man, domiciled within the province of Canterbury, should, in taking a journey northward, marry a lady within the province of York, though they went immediately home and resided during the rest of their lives within the province of Canterbury, the wife would be entitled to five-ninths of the personal estate.

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“ Taking it the other way, we know there are persons who come from that part of the world to which the custom of the province of York extends ; they happened, perhaps, not to think much about these things ; in advanced life, they are likely to go home again, and they take their chance ; they are husband and wife, in this respect, as in all others, for better or for worse ; and I should conceive it to be quite clear law (though it seems to have puzzled some very learned persons in the statement of this case), that a man might come from a particular part of the north of England ; and, supposing he had married in the north of England, where if he had died before he accomplished his purpose of taking his journey, his lady would unquestionably receive five-ninths of the personal estate, yet if he came up to London to better his fortune, (as we north country people are apt to do), and died in London, his wife would take her one-third according to the custom of the province of Canterbury, and if, in his old age, he had retired to the land of his nativity and died intestate, the lady then, who, in the first instance, would have been entitled to five-ninths, who had by the course of events lost that right, and became entitled in the second instance to only one-third ; and when her husband returned again to the province of York, dying in the place in which he was born and married, she would be restored again to the five-ninths ; her condition as a wife, and her right as wife, being altered from time to time, exactly as her person followed her husband’s person, from one place of domicile into another place of domicile, till it was at last decided by his death, where he left his residence in this world. I take *that* to be quite clear law.

“ I think it was as long ago as 1704, unless I mistake the import of the case, that, as amongst French people, the law of England had decided this ; for, in the case of *Foubert v. Turst*, in *Brown’s Parliamentary Cases*, 38, this case occurred : A French lady and gentleman married at Paris, and having married there, there was a written agreement, by which certain sums of money were disposed of, and with respect to the other property which the parties had or should acquire, *that* was, by this agreement, according to the construction put upon it in our courts, to go according to the custom of Paris. After the marriage was had, the lady and gentleman thought London was a better place to reside in than Paris, and came here. They lived here some years ; at length the wife died ; and the ques-

1804. tion arose, upon her death, how the property was to be distributed? It first came on in the Court of Chancery. The Lord Chancellor was of opinion that it was not the intent of that agreement to attach, under all the circumstances, the rule which the custom of Paris afforded as to the distribution of the property. He held, that the parties being domiciled in this country, the law of this country must decide the right to his share in his wife's property. That was afterwards reversed in this House. But upon what principle was it afterwards reversed in this House? Why, upon a principle which showed what the conception of this House was as to the law if there had been no rule for the application of that principle, for it is distinctly admitted, in the printed reasons by the counsel on both sides, but especially in the printed reasons by the gentleman who was a counsel for the husband, that though the parties married at Paris, the custom of Paris would not follow them; and the ground upon which the Lord Chancellor's decree was taken to be wrong was this, (and an extremely clear ground it is), that then the parties had, in Paris, come to a written agreement, the true construction of which written agreement was, that wherever the parties died, the custom of Paris should regulate the distribution, therefore said this House, it is not the regard which the law here administering property has to the custom of Paris, but the *rule* is founded in the *contract* which the parties themselves had entered into; and that contract which they there entered into will travel with them, though the custom will not follow them. The contract will attach upon the property after the death of the parties. The meaning of the parties was, that it should so attach upon the property after death, and there can be no reason in the world why the parties should not say by express contract, that the *locus contractus matrimonii* should decide. They may do so, if they please, in a written agreement, which shall describe what shall be the share of the wife in the property of her husband when he is dead.

P. Wm's. vol. i. p. 429. "It seems to me also, that that case was recognized to be very good law, in a subsequent case of *Freemoult v. Dedire*, in Peere Williams' Reports, p. 429. The result of the case may be stated to show this, that it was the opinion of the Court at that day, that where the marriage had been had in Holland, the distribution in this country, if the party died domiciled in this country, would be certainly according to the law of Holland, if you showed there were articles saying that the distribution should be according to the law of Holland. But they seem to have refused, in that case, to make the distribution according to the law of Holland, because it had not been proved as a fact in the cause, what was the law of Holland, which these articles had stipulated between the parties should furnish the rules of distribution.

"Your Lordships have already gone the length of deciding, in the former stages of this cause, that with respect to the children's share, upon the death of their father, it is the *locus domicilii* at the death

of the father that must decide what they are to take. In this case, the marriage was had in England. Some of the children were, I believe, born in England, and Mr. Hog having altered his domicile, and dying domiciled in Scotland, your Lordships held, that because they were the children of a father domiciled in Scotland, notwithstanding that was not the *locus contractus matrimonii*, the law of Scotland must decide upon the rights of those children. I believe it would be next to impossible to say that there is any distinction to be made between the legitim of the children as taking by such succession, and the *jus relictæ* of the widow as taking by the same. It would be absolutely impossible, if the wife survived the husband, that you should say, that though the marriage was in England, the children of that marriage should take according to the law of Scotland, where the man was domiciled; but that the wife should take according to the law of England, where the man was married. Unless you could say, in the case of the wife surviving the husband, that her interest was to be decided by the law of England, where the marriage was had, although the right of the children, who in a sort derived their title under that marriage, depended on the law of Scotland; that is, that the surviving wife took according to the *locus contractus matrimonii*, and the children according to the *locus domicilii*, it would be difficult to distinguish between what the wife takes, in the character of wife, if she happens to die in the lifetime of her husband, and what she takes in the same character, and under the same title, if she happens to survive the husband. It seems to me, therefore, when a distinction is taken between the *legitim* and the *jus relictæ*, in the manner in which it has been taken in this case, that the distinction is not substantial enough to be acted upon.

“ A vast number of ingenious difficulties have been stated upon this subject, which may deserve a great deal of consideration, but we may here lay out of consideration all those cases upon which it has been asked, What are to be the consequences if a man marries in one place and goes immediately to dwell in another? If any persons were to go into Scotland, get married at Gretna Green, or any where else, and come back to England, or if they came from Scotland and were married in England, in the one case, if the parties returned immediately, and became domiciled in England, or, in the other case, if the parties returned, and became domiciled in Scotland, in both these cases, the place of marriage is a mere incident in the form of the contract, and would not alter the law, which says that the place where the parties *bona fide* reside, and that I shall call the *bona fide* residence of the husband, will decide upon the rights both of the wife and of the children.

“ But it is said, that if there be no express contract when the marriage is entered into, there must be an implied contract, and it is assumed that that implied contract is this:—that the distribution which the law would make of the property of the husband if he were

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to die *eo instanti* that the marriage was celebrated, is the distribution which must be made of the property of the husband dying intestate at any distance of time from the period when the marriage was contracted, and under all the circumstances of mutation and change which might have taken place.

“ It appears to me, that those who say that there is such an implied contract beg the whole question, because the question is, whether the implied contract is not precisely the contrary? This being a contract attaching upon property, in consequence of its being personal estate, whether the true implied contract must not be taken to be, that the condition of the wife, in respect to her expectation, should change as the condition of the husband changes with reference to the law of the country in which they are resident.

“ Cases of great hardship may be put with respect to Scotch and English ladies. They tell you, with reference to a marriage in England, the moment the husband contracts that marriage, all the debts due to the wife, and property in the wife, attach to him; but that in case of a marriage in Scotland, with respect to all debts due to the wife, the husband must take the trouble of taking his hat off to request the payment of that money from those from whom it is due her, before he vests a right to it in himself. But really this difference is not very considerable, because, although it be that the husband, if he happens to die, without having done any act to stamp the character of his own peculiar ownership upon the property of his wife, is taken to have chosen to let it go to the wife, because he chooses to forbear to take that which, previously to the connection, was hers. Yet, on the other hand, there is nothing more clear than that the law supposes he may receive it when he pleases; for a man cannot, without evidence, be supposed to forego that which he takes in right of the wife. He may assign it for valuable considerations, or he may make it his own to all intents and purposes, and the moment he chooses to make it his own, he may assign it to persons in trust for the wife, who may have in this country the special equity of claiming to have some provision made out of it for herself.

“ But the true question is, whether it is not of necessity that the husband and wife, or the one of them, and if the one of them, which of them, is to determine, in what manner, and in what place, the husband is to struggle for the means of provision for himself and his family whilst he lives, and for all the means of provision for the family which he shall leave behind him after he is dead; and when you shall say that both in England and in Scotland (about which there can be no doubt), it is competent for the husband to spend every shilling of the property, to alien *bona fide* every shilling of the property, what does that amount to but this, That the husband, if he pleases, has it in his power to make it of as little consequence to both his wife and children, in what country they resided at his death, as if they were in no country at all.

“ The true point seems to be this, whether there is anything irrational in saying, that as the husband, during the whole of his life, has the absolute disposition over the property, that, as to him, whom the policy of the law has given the direction of the family as to the place of its residence, that he who has therefore this species of command over his own actions, and over the actions and property which is his own, and which is to remain his own, or to become that of his family according to his will—why should it be thought an unreasonable thing, that, where there is no express contract, the implied contract shall be taken to be, that the wife is to look to the law of the country where the husband dies, for the right she is to enjoy, in case the husband thinks proper to die intestate ?

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“ This has been the principle which it seems to me has been adopted, as far as we can collect what has been the principle adopted, in cases in those parts of the island with which we are best acquainted ; and not being aware that there has been any decision which will countervail this ; thinking that it squares infinitely better with those principles upon which your Lordships have already decided in this case, it does appear to me, attending to the different sentiments to be found in the text-writers upon the subject, that it is more consonant to our own laws, and more consonant to the general principle, to say, that the implied contract is, that the rights of the wife shall shift with the change of residence of the wife, *that* change of residence being accomplished by the will of the husband, whom, by the marriage contract in this instance, she is bound to obey.

“ Is there any inconvenience in this ? None in the world ; because it is an equally acknowledged principle, that though the custom of the place may not follow the parties to this contract, which places them in relation of husband and wife, and children ; yet it is undeniable law, that they may contract, under hand and seal, that the custom of the place shall follow them ;—whether it will be convenient, in ninety-nine cases out of a hundred, that there should be such a convention, and such a contract, or whether it will not be mightily inconvenient to the affairs of families to form such a contract or convention, is a question as to which persons viewing it, may think very differently about ; but if there be any inconvenience in the circumstance of such a convention not being formed upon the marriage, it is an inconvenience neither of a higher nor less nature than any other which attaches upon that relation which is to be left to the providence of parties when they enter into that relation ; but which can be met by the providence of parties when they enter into that relation, and to which inconvenience they expose themselves, if they do not think proper at the time to provide against it.

“ It may be said in this case, and truly may be said in ninety-nine cases out of a hundred of a similar sort, if they arise, that this is a surprise upon the parties. The true answer to that is, that I believe the parties never thought of it ; when they entered into this mar-

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riage, they entered into no contract by which this lady was to take one penny of her husband's property, but they entered into a contract, by which she was to have somewhat more than two-thirds of her own property converted into land, with a power to her to give this to any of her children that deserved best of her: They could not have but considered that Mr. Hog must die somewhere, that he was likely to die in England; but there is no stipulation that she shall have one shilling left to her. She takes her chance, under the effect of the marriage, whether she shall or not receive anything, even upon the casualty of the husband dying intestate. If he had thought proper to lay out all his money upon land, and had taken the caution to lay it out in the name of a trustee, instead of in his own name, she would not have had what the Scotch called *terce* and we call *dower*. On the other hand, if Mr. Hog had, that which it appears he had for a great number of years, a very strong inclination, and a fixed purpose to reside in Scotland where he was born, and to die there; one should think, if he had thought proper to attend to this subject with caution, he would have asked what would be the state of his wife if he did die there? But the truth is, that parties do not think upon this subject when they enter into these contracts; they get a bit of a settlement made, and very important interests remain unattended to.

"But I think it appears that this claim could not be matter of much surprise, when your Lordships come to see how this matter was regarded by men of business in Scotland;—because, though this lady died in 1760, and though Mr. Hog unquestionably became afterwards a domiciled Scotchman, having realized property in land in that country, whenever provisions were tendered to the other children, or to the appellant herself, your Lordships observe the persons who drew those discharges thought there might be at least some colour of claim under their mother's decease, and that circumstance, that there might be that colour of claim, whilst it contains an intimation upon the point at law, that at least it was doubted by the lawyers in Scotland, whether this might not be supported, is also a material circumstance in another respect, that it contains a strong intimation as to what they believed to be the fact with respect to the domicile of the father at the decease of the mother.*

"Without entering, therefore, into a great variety of very nice cases which might be put, and which might be all reasoned down, in my apprehension, to the single question, which is the principle that you are to imply from the contract of marriage, whether it is to be considered that the rights of the wife must vary with the rights which attach upon her residence in different places, and that her right to succeed to her husband must depend upon the domicile which he had at the time of

* The discharges were drawn out in the common form of such discharges in Scotland.

her death, if she is dead, or the time of his death, if she survived him ; or, on the other hand, that the *locus contractus matrimonii* is to regulate the distribution of the property, and through all the changes in future life, her right is to remain unaltered in a case in which there is no express contract at all. It does appear to me that the rule we have adopted in this country is the better rule, and, therefore, I shall presume, upon that part of the case, in the application of that principle, to submit to your Lordships the propriety of altering the interlocutor, so far as they deny Mrs. Hog's right to transmit to her next of kin, she predeceasing her husband, the usual shares in the goods of that husband.

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“ But this cannot be done without deciding a question of fact, because if it be true, that this gentleman was not domiciled in Scotland in 1760, then, for the same reason, it must follow that if he was at that time domiciled in England, she could not claim, because she must be bound by the law of the place of his then residence, and, as in the case I put before, of a change of residence from a place in the province of York, to a place where the law of the province of Canterbury applies, it might be that her rights might change twenty different times during her life. I have little doubt that, without any suspicion of it, there are many persons who have different places of residence, who are changing their residences repeatedly, (each of which they call their fixed place of residence), and whose property, if they happen to die without a written disposition of it by them, must be distributed according to the law in the province in which their decease takes place. So, in the case I put, I feel no difficulty in saying, that if I were to marry in London to-morrow, and afterwards to go and be domiciled in Scotland, and then I were to come up to London again, and afterwards to go to Scotland again, as it appears to me, the principle must apply, from time to time, according to the place of my residence, and not perhaps as I choose it should apply; but then it is entirely the consequence of my own act that it does so apply.

“ The question, whether Mr. Hog had his domicile in Scotland in 1760, is, however, a question which your Lordships must decide before you can say, as I before stated, that there is any room for a decision in this case, founded upon the communion of goods. This point of the domicile is argued with another point under the cross appeal taken by Mr. Hog in this cause. I beg distinctly to state to your Lordships these two points, in order that the rule of this House, as to cross appeals, may be understood, not thinking, in my poor view of the case, that it is very important to the parties what the rule of the House is, as to this point of the domicile, but because there is another question in this case, which your Lordships may perhaps think deserves attention, with reference to whether you can alter the decision, and whether this cross appeal be rightly or wrongly presented to your Lordships' consideration ?

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Doubts if the
interlocutor
right as to ex-
penses of pro-
bate and con-
firmation.

“ The two points contained in that cross appeal, are the question as to the domicile at the death of Mr. Hog, which Thomas Hog contends, upon his cross appeal, ought to be held to be a domicile, not in Scotland but in England, and the other is, upon the expenses of the confirmation in Scotland, and the probate in England. It is insisted by Mr. Hog, that those expenses ought to be so thrown upon the personal estate, that some share of those expenses may fall upon those who are interested in the claim to the *jus relictae* and legitim. The Court of Session seem to have thought otherwise. I will not take upon myself to say how it may be in the law of Scotland. That is a question your Lordships may decide, but, in this country, I take it, it would be quite clear that the expenses of confirming, or of clothing yourself with that character, which somebody must have, in order to deal and to transact with the personal estate, (whoever may have a claim beneficially to enjoy the personal estate,) would be a charge upon the whole fund. It would be in the nature of a debt upon the whole fund ; and I should considerably doubt, and I beg my noble and learned friends’ attention to this part of the case ; I cannot help entertaining a doubt, whether that part of the case is rightly decided against Mr. Hog.

Cross appeal
not necessary
in order to
discuss point
of domicile.

“ With respect to the question of domicile, it is of no importance whether this appeal was brought in time or not ; because those who state to your Lordships that, under Mr. Hog, they were entitled to claim in respect of the communion of goods, must make out, on their part, that Mr. Hog was domiciled in Scotland at the time the wife died. The question, therefore, whether Mr. Hog was domiciled in Scotland at the time Mrs. Hog died, is a question just as open to your Lordships whether there is a cross appeal or not a cross appeal. That is the material question in this cause between the parties ; and one should have had to lament that we could not get at a question of that kind, in some cases that might have occurred, because the cross appeal did not come in time. Certainly, in this case, the question, though great and important, does not administer occasion for that feeling, because it seems to me impossible that those who contend for this community of goods, can make out their title, without satisfying your Lordships what was the residence at the time ; and when they undertake to satisfy your Lordships that such was the residence at the time, they let in an opportunity for those contending with them to say, that such was not the residence.

Domicile
itself.

“ With reference to the question, whether Scotland was or was not the residence of Mr. Hog, at the time of Mrs. Hog’s death, that depends upon a very minute attention to all the circumstances which are disclosed, as matter of evidence in this cause, with respect to the mind and intention of the party upon that part of the case. I shall not give your Lordships the trouble of going through an accurate statement of the whole of the evidence, because I have not perceived in your Lordships’ House, from the beginning of this cause to the

end of it, any tendency to doubt in the mind of any one of your Lordships whether those interlocutors that have declared him to be domiciled in Scotland at the time of the death of his wife, were or were not well founded. It seems to me that the whole of the passages which are to be collected from the letters, and which have been relied upon at the bar, amount to no more than such as would entitle your Lordships to represent this matter thus: This gentleman had originally come from Scotland to make his fortune in England; he seems to have been a very sensible and a very industrious man. He had succeeded in trade to a great extent, but throughout his whole life he seems to have been influenced by a determination to spend as much of his life, and particularly the latter days of that life, as he could in his native country. He meant to take there his *summa rerum*, he meant that his establishment should be there, and he was acting upon that intention when he went there. It is always a very nice question, if you are called upon to decide it immediately after a change of residence, whether that change of residence has actually operated a change of the testator's domicile; but we have not such difficulty in the present case; it is admitted that Mr. Hog was domiciled in Scotland at the time of his own death. Upon the whole, I see no reason to doubt that he was domiciled in Scotland at the death of his wife.

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"In regard to the other point taken under the cross appeal, the expenses of the confirmation in Scotland and of the probate in England, there are two questions which will occur. The first will be, Whether it has been decided upon a right principle, that is, whether the expense of confirmation in Scotland and probate in England, has been thrown upon the right fund; and, if it has not, whether, considering the time when the appeal was brought here, subject to a protest made at the bar, you can consider, with reference to the consequences of that protest, that the appeal has been brought at such time as that your Lordships can give relief upon that part of the case?

"The rest of this case calls for your Lordships to apply your consideration to a very important branch of the law of Scotland; and the facts of the case which give rise to the consideration of that important question of law will require a very minute and accurate detail. It is the question, what is the amount of the legitimi? In order to determine that question, your Lordships are to decide whose property the various shares in the bank stock, which at one time were undoubtedly the property of old Mr. Hog, were to be taken to be at his death; and there are minor questions, and questions with respect to the money arising from the sale of the Kingston estate, a question as to a debt of £1000, out of what fund that debt is to be paid,—and the question with respect to bringing into contribution what has been advanced to the children. These all fall under another distinct head; and as I am sure I shall not be able so accurate-

1804. ly to detail all the circumstances which relate to the state of facts
 upon which these questions are to be decided, as it seems expedient
 LASHLEY, &c. they should be detailed, or to bring before your Lordships' consid-
 v. eration the points of law which are to be applied to the decision of
 HOG. these questions, in such a way as I should wish to do, if I were to
 call for your Lordships' further attention upon that part of the case
 to-night, I should hope your Lordships will not think it improper if
 I were here to leave this statement of what I shall humbly propose
 to your Lordships, meaning to proceed with what remains of the case
 in the course of to-morrow afternoon.

Adjourned.

July 10th, 1804.

LORD CHANCELLOR.

"My Lords,

"I adjourned the consideration to the present day of the question
 as to the amount of the funds out of which the legitim is to be paid.
 That question subdivides itself into several points.

Several ques-
 tions stated.

"The first and most important one is most extremely important,
 not merely with reference to the parties in this cause, but with refer-
 ence to the general law of Scotland upon the subject. It is, whether
 certain shares of the stock of the Bank of Scotland, which are
 admitted to have stood in the name of the respondent Mr. Tho-
 mas Hog, were or were not the father's moveable property at the time
 of his death?

"Another question is, whether the respondent was a creditor on
 his father's funds for £2500, which your Lordships recollect was the
 value of the estate which, under an appointment made by the mother,
 was conveyed to the respondent Thomas Hog, and also the sum of
 £1000 which he received with his wife, and lent to his father, who
 granted him a bond for it.

"A third question is slightly touched upon, which is, whether
 the respondent was entitled to the deduction of the expenses incur-
 red by him in obtaining confirmation in Scotland and probate in
 England, of his father's will?

"A fourth was, whether the sums paid by Roger Hog, in his
 lifetime, are to be considered as forming a part of Mrs. Lashley's
 share, in calculating what is due to her?

Legitim.

"With reference to this part of the case, I believe I shall be
 founded upon the authorities which are stated in the text writers on
 the law of Scotland, and the decisions of the courts of Scotland, if I re-
 present to your Lordships that legitim can be claimed only out of the
 moveable property belonging to the father at his death, and that this
 claim of the children to the legitim is a claim which leaves the father
 an unlimited power of disposition during his life; for it seems that

though the claim of legitim cannot be defeated by any deed executed on deathbed, or by any deed of a testamentary kind, which is to take effect at the father's death, yet it does not interfere at all with the father's right of administration while he is living and in health. Thus he may disappoint his younger children in various ways;—he may disappoint them by converting moveable property into heritable property; he may contract debts if he thinks proper, which debts would be a charge upon it; he may spend his estate in the most improvident manner in which he chooses to spend it; and he may give it away if he thinks proper. Provided he makes the disposition in time, all these acts which he may do, are to be considered certainly with reference to the question of the amount of the legitim. Your Lordships are still to determine whether the claim of legitim is capable of being considered as a right of property, as a *jus crediti*, or only as that which the children are to obtain under the hope and expectation of what the father may think proper to leave at his death.

“The question therefore is, substantially, What was his fair moveable property at his death? and that question will fall to be determined, regard being had to the consideration, that if an heir or donee has a mere nominal interest in the property, that is, if he is in the nature of a trustee for the father, it will be not less the property of the father, because it is ostensibly (if it be but ostensibly) the property of another. This alludes to the Bank shares.

“My Lords, the law of England furnishes a class of cases that seems to have some, though perhaps not a perfectly strict and correct analogy to the nature of the claim, with reference to which I am now speaking, for it will be familiar to some of your Lordships that it is not an unusual thing for a parent, when he gives away his child in marriage, to enter into a covenant that he will leave that child a share of his property equal to that which any other child at his death shall derive from him. Your Lordships perceive, that when that sort of obligation is entered into by a parent, he leaves to himself as complete, and indeed a more complete power of administration than the father has under the general law of Scotland, because, in addition to those acts which the Scotch parent is capable of performing, and which I have enumerated to your Lordships, the English parent, having bound himself under that obligation, is at liberty not only to spend every shilling of his fortune, but he may give away every shilling of that property, provided he does give it away the day before his death.

“I apprehend, however, that there can be no manner of doubt, Bank stock. that if an English parent having entered into such an obligation, were to transfer any part of that property to any one of his children, by an instrument upon the face of it, the most absolute and complete that could be conceived in terms; yet if it appeared that, subsequent to that gift, the parent himself, from time to time, enjoyed

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1804. the interest, dividend, or produce of that property, as it might yield, according to its nature, interest, dividend, or produce, that the receipt of the income of it would be complete evidence that the gift was a trust for the father; and that if the father died under such circumstances, the child with whom he had entered into such a covenant, as I have stated, that he would leave to that child as much as any other child should derive from him at his death, would have a right to say, that that property was part of the father's property, and would have a right to claim, upon the footing of considering it as part of the father's property.

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"I wish to mark, in this part of the case, very distinctly the doctrine which I have now presumed to state to your Lordships, for another purpose, which is this, that although, perhaps, secretly between the father and the son, there might be an intention that the son, in such a case, should only pay, during the life of the father, the interest and produce of that property which had been so transferred to him, and that the son himself should take the property at the death of the father, yet if that agreement was not capable of being evidenced by testimony, admissible for that purpose, if the inference of law was to be collected from the mere fact, that the father was permitted, during that time, to receive the interest, dividend, or produce of that property, the inference in law would not be, that the father was entitled to that interest or property for the limited term of his life; but there being no special agreement capable of being proved that that limitation was intended to be put upon his enjoyment, the evidence which proved that he ate of the fruit of the tree, would be testimony in our courts of justice that he was the absolute owner of the tree which produced that fruit, and we should not hear it said, in a question between his children, that the father meant, in such a transaction, where there was nothing to show his meaning but this enjoyment of the produce of the property, that it was meant between the father and the son, to whom the ostensible transfer had been made, that the father was to have only a limited interest in it; that the property was given away from the moment of time the gift was made, and that the son was to be in the nature of a reversioner. There must be an express contract, I apprehend, before our law would admit that such was the nature of the intention of the parties to that transaction.

"But I go a great deal farther than that, because it has, I conceive, been settled by repeated decisions in this country, that if a father, upon the marriage of his child, enters into a covenant, that he will leave that child as much as he gives to any other child descended from him—after he has entered into that engagement, the law allows him, if he thinks proper, to give away his property as improvidently as he pleases; but an interest of this sort would hardly be worth having, if the law did not impose, for the protection of that interest, this guard upon the parent, that he shall not enjoy his pro-

perty as beneficially himself, having given it away, or nearly as beneficially as he would enjoy it if he had not given it away; and it would be competent for him at any moment to defeat the obligation he meant to enter into, to make an equal distribution among his children, if he could before his death say, I will give the whole of my property to one child, and that child shall give me the whole produce of that property during my life, and he may contend, after my death, that because I had given it on a day antecedent to my death, that it was given in such way as to prevent the operation of my covenant with respect to that property. I take it to have been decided in our courts of justice repeatedly that *that* cannot be done. I have stated what I conceive to be the views of the law of England upon the subject, that due attention may be given at least to the principles which have governed our decisions in this part of the island, upon a subject which seems to me to come the nearest to the subject, of the right which falls under consideration, a question resulting out of the circumstances which I am now about to state.

“ Mr. Hog, the father of Mr. Thomas Hog, appears to have been, in the course of his life, in the habit of purchasing, at different periods, I think, from the year 1772 to a very late period of his life, various shares in the Bank of Scotland; and it appears, that in point of fact, between the year 1772, and the time of his death, he had become the owner at least, of one hundred and forty-four shares of the stock of that bank. When I say he became the owner of 144 shares, I mean that he had purchased 144 shares, some of which stood in his own name, and some in the name of his son;—I do not presume to state to your Lordships, that if it can be contended they were a fair purchase in the name of his son, and nothing more, that then the son is a trustee for his father: for the inference of law would be, that it is *prima facie* a gift to his son, and therefore, in the question relative to these shares of bank stock, it must be admitted that Mr. Hog, the respondent, has a right to the benefit of the principle, which is, that *prima facie* what is bought in his name, is given to him. So it would be in our law. At the death of the father, having in the course of his life bought this number of shares, some standing in his own name, some standing in his son's name, some originally purchased in his son's name, some occasionally transferred into his son's name, some retransferred into his son's name, which had been transferred from his son's name into his own, it has been made a material question between these parties, how many of these shares of stock belonged to the father of the parties who are now contending at your Lordships' bar; Mr. Hog, the respondent, insisted that there were only 24 shares which belonged to the father at the time of his death, that 39 shares had been given to him some time before the period of his father's death, and that 81 shares had been given to him at a period very recent before Mr.

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1804. Hog, the father's death ; at a period so recent before Mr. Hog's death, that between the date of that transfer and the date of Mr. Hog's death, there had been no dividend payable on the 81 shares, so that no evidence could arise from the fact of the application of the dividends, what was the purpose of the transfer so made as to these 81 shares,—and therefore, if that transfer cannot be connected with any other circumstance, it should seem clear, that as this was a transfer made whilst the father was in *liege poustie*, and a transfer made of property which he had a clear right to give away, if he thought proper to give it away, if there were no other evidence attaching upon these 81 shares, with a view to show who the true owner was, it would be *prima facie* evidence of a gift out and out to the son, and to be considered as his property.

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“ It appears, that in the year 1787, Mr. Hog, the father, had made a testamentary disposition, and by that he had conveyed to the respondent his whole personal estate, for the purpose of being vested in landed property, which landed property he meant to be settled in the same manner, and according to the same course of entail as that which he had before purchased, viz. the Newliston estate ; but from these he excepted 39 shares of stock of the Bank of Scotland, having by this disposition expressly given all shares or stock in the company of the Bank of Scotland, and all stock in the public funds, which should belong to him at the time of his decease, exclusive of 39 shares of stock of the Bank of Scotland, which were transferred, as he says, sometime ago to the said Thomas Hog, and which he professes it is not his meaning or intention should fall under this conveyance, but that those 39 shares should remain with his son as his own right and property, notwithstanding any obligation granted by him to his father concerning the same, of which obligation, or any other in regard of the said 39 shares, the son was thereby acquitted and discharged, so that the purpose of the father clearly was, at the time he made this testamentary disposition, to give to his son an interest which your Lordships have determined he could not give as against the other children, on account of this claim of legitim, by giving to his son these shares of bank stock, for the purpose of being laid out by his son in land, to be entailed in the same manner as the estate of Newliston ; but either recollecting, or conceiving that, with respect to the 39 shares ; or misconceiving that with respect to the 39 shares, his son had, at some period of his life, come under the obligation to him by which he had declared himself in effect to be but a trustee to his father, he excludes the terms of the trust so created by his testamentary disposition of 39 shares, and he attempts by this testamentary disposition in effect to cancel and discharge the obligation, rightly conceiving or misconceiving, in making that disposition, that by the obligation which his son had come under, he acknowledged himself to be trustee of the 39 shares for his father.

“ It occurred to those who had in Scotland the duty of attending

to the interests of Mr. and Mrs. Lashley to contend, first, with respect to those 39 shares, that they would be entitled to legitim upon them, because, in the first place, this testamentary disposition could not take effect upon them; and, in the next place, because the obligation itself was never cancelled, nor meant to be cancelled; that there was, as they asserted, a sacred trust between the son and the father in respect to the 39 shares, and a sacred trust also as to the father, in a subsequent act, as to the 81 shares. Mr. Hog was himself called upon, according to the forms of the law of Scotland, to give an account of what he conceived his interest to be in the shares of stock, and particularly in those shares of stock with respect to which he had given any acknowledgment whatever to his father, and he represented, in his answer to the interrogatory addressed to him for that purpose, 'that about twenty years ago or upwards, (and as far as I recollect the time of his examination, it would bring that back to the year 1774), but the precise year he does not remember, the deponent's father purchased some shares in the stock of the Bank of Scotland, which were transferred to the deponent, and some time afterwards he gave a letter to his father, the exact words of which he does not recollect, nor the number of shares to which it related, but that, in general, it imported that these shares were to be considered as his father's, and an obligation on the deponent to transfer these shares to him or his order, when required so to do. That sometime after this, at an annual election of directors of the said bank, the deponent, who was at that election elected a director, stated to his father, that in consequence of his having granted him the above mentioned letter, he could not take the oath as a proprietor or director, as not holding the said shares free and independent, upon which the father told him he need not give himself any concern on that account, as he intended the deponent should have a complete right to the said shares, to serve as a fund for providing for his younger children; and added, that he would cancel the letter or declaration which the deponent had granted, and therefore that he was at perfect liberty to take the oath required. That upon this the deponent was satisfied, took the oaths of trust, and has continued to be elected annually, and to act as a director in his father's presence during his life, and ever since;—and the deponent is certain that at no subsequent period did he ever grant any letter or declaration to his father, relative to the above shares, or to any others which were afterwards acquired for him by his father, and that he never saw the above mentioned letter after he granted it to his father, and does not know or suspect where it is.'

"This declaration, your Lordships observe, refers to a period twenty years or upwards preceding the time at which the deposition was made, and it is but fair to observe, that upon a transaction which had so much of ambiguity about it, both as it respected the father

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1804. and the son, the son in his deposition might, without blame, be somewhat inaccurate, and the father might, without being exposed, LASHLEY, &c. I think, to the imputation of being an extraordinary inaccurate man, be also in some degree inaccurate.
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“ It has been stated, I think, at your Lordships’ bar, that it requires ten shares of stock to be a director of the Bank of Scotland; and, in order therefore to try the effect of this deposition, it becomes necessary to look very attentively to the number of shares which Mr. Hog had from time to time, throughout the period in which it appears that he was in the habit of making purchases of shares, either in his own name, or in his son’s name; and unless I mistake the effect of the evidence in this case, it will be extremely difficult to say, that at any period of the twenty years or upwards, to which the deposition can be supposed to refer, it can be a very accurate account of the transaction, that it was the intent of the transaction, in which the letter was given, to qualify the son to be a director of the Bank of Scotland, and conscientiously to take the oath to enable him to act as such director. If he had less shares than ten that could not be the object—if he had a great many more shares than ten, that could not be the sole object. Yet still that might be one object among others, and it might be the intention of the father at once to qualify him for being a director of the Bank of Scotland, and also to give him a capacity of making that provision for his younger children which this deposition asserts was the fair intention which his father’s mind had conceived, and had adopted this means of effecting at one and the same time.

“ It may be misapprehension, but it will be worth while to examine the evidence upon that subject, whether it could be possible that the son can speak accurately. I do not mean to lay great stress upon the subject, if it be an inaccuracy in point of time, it is likely enough to be so without making any imputation upon the moral honesty of this gentleman. But unless I misapprehend the fact, it will be found extremely doubtful, whether any letters he could give at that period, could have reference to such a number of shares as could enable this gentleman to act as a director at that time.

“ If this were a question merely between the father and the son, and if the purpose of the father was to give such a number of shares to the son as would enable the son to act as a director, whether taking any oath or not, but much more if it were to enable the son to take this oath, and act as a director, where the father must, if he had that interest alone, be holding out his son to those who had interests to be well and duly attended to and managed by a person properly qualified in respect of property, to be placed in that situation, in which he cannot be placed according to the law, unless he has so many shares as to render himself properly qualified, and upon principles much more sacred and much more important, if he placed in his son’s name, a property informing that son that he might pledge him-

self to God and man by his oath, as the person really entitled to that property, in a question between the father and the son, to be determined immediately after that transaction took place, no court of justice would have suffered the father to have holden a language which imported that he had not effectively done, what he promised upon the outside of the thing to do. This is quite familiar in this country: your Lordships know there are a great many situations with reference to which qualifications are necessary. One is familiar with this, that a person cannot have a seat in parliament, in this country, unless he has a clear freehold estate of £300 a-year at least, at the time he takes his seat—that estate once given, it is supposed can be taken back, but it cannot be taken back as against the creditors of the man to whom it has been given; and whatever may be the question as between the party who gives, and the party who receives, public considerations having determined that he shall receive that estate before he can act in this character of a member of parliament, I conceive that there would be no manner of doubt, that every judgment which the receiver of that property had recorded against him in Westminster Hall, would follow that property, if it went back again, even by conveyance, into the hands of the man who granted it. For where the law requires that a man shall have a property, and when a third person intervenes to give him the qualification, in order that the law may be satisfied, the law will not permit either the one or the other to disappoint the purposes for which that law was made. I take it, therefore, to be quite clear, in this case, that it is impossible to touch these 39 shares, if they should be found, upon examination, to be the subject of transfer made with this intent, if the question is to be considered as a question merely between the father and the son.

“ If, therefore, these 39 shares had been given, whether twenty years ago or ten years ago, or at any other period, and nothing further had occurred in the case than that there was that gift; if, for instance, the dividends and profits of the 39 shares had remained dead in the bank, and had been received by nobody; if there were no evidence to show that there was a re-transfer contracted for, or a trust *bona fide* afterwards had, it would be perfectly impossible to touch this property, unless you are to say, that whatever the rule may be between the man who makes the conveyance, and the man who receives the benefit of the conveyance, the rule shall not operate to the prejudice of third persons; and it has been argued at your Lordships’ bar, and strongly argued at your Lordships’ bar, that although you would not permit the father to say, as against the son, that that gift which he had made, in order to qualify him to act as a director, swearing to his qualification, should be looked at as anything short of a gift, perfectly absolute and perfectly consummate in its nature; yet if the purpose of that gift was really to defraud the other children of the marriage, you would, in such a case as that, say, that

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1804. at this instance you would examine the real nature of the transaction, and, examining the real nature of the transaction, you would, as with respect to third persons, set it aside.

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" Now, it appears to me, without saying more upon it, for it is not necessary, in my view of the case, to say more upon it, that it would be a difficult thing to maintain *that* proposition. In the case of a creditor in this country, unless he has carried forth his diligence to such an extent that he has got a lien upon a man's property, if he, upon whose property the lien is, conveys it to another to make a qualification, he fails in his purpose, inasmuch as it is not a qualification free from incumbrance ; but, supposing the subject unfettered by any incumbrance, and to be in truth conveyed from A to B, the creditors of A, who had no lien upon the property whilst it was in the hands of A, had no reason to complain : it was their own fault that they had not acquired a lien. So when it comes into the hands of B, the rights of B's creditors immediately attach upon it, and it cannot be the property of both A and B, for the purpose of permitting the claim of both one and the other to attach upon it ; and it would be found extremely difficult to say, that if this matter of the 39 shares had been to have been decided immediately after the transaction took place, it would have been competent for the younger children to have raised that contest which the father himself could not possibly, upon the ground of the policy of the law, have been permitted to raise in a question directly between himself and his son, to whom he had made the transfer.

" But it is extremely possible that the thing may acquire a very different complexion by the subsequent transactions between the parties, with respect to the property ; and it is alleged in this case, that notwithstanding these thirty-nine shares, or notwithstanding any other shares, more or less in number, were originally placed in the name of the son, or were by transfer placed in name of the son, yet that, in point of fact, all the transactions of the father in his lifetime, with reference to all the shares, whether they stood in the name of the father or stood in the name of the son, were transactions which would have taken place precisely in the same manner as they did take place, if every one of those shares, to the whole amount of a hundred and forty-four, had from beginning of the time that any of those shares were purchased, to the end of it, stood in the name of the father, and the father only.

" It is said that the expense of these transfers was paid by the father, if further subscriptions were called for ; the sums paid in discharge of the further subscriptions were paid by the father ; and the dividends *de facto* accounted for in the manner I shall have occasion to take notice of. The dividends upon the whole were, in fact, carried to the account of the father, being received by the father's bankers, as they necessarily perhaps must be received. Some

of your Lordships will know more correctly whether I am right or not than I can say I know myself to be upon this point. But I presume, where shares stand in the name of any individual, they cannot be received but by the authority of that individual. But whether the authority was or not given by both father and son, the produce of these shares, standing both in the name of the father and son, were received under such authorities by bankers, who carried the whole to the account of the father. In short, they do allege that every act of ownership (independent of the circumstances of the apparent ownership created by the property standing in the name of the son), was exercised by the father during every period of his life, except as to what I have to observe with respect to the 81 shares, which were transferred shortly before his death. And they say that *that* is very strongly confirmed by the date of the general disposition of the father, in which, as your Lordships observe, he attempts at least, not only to give all the shares which were then purchased, either in his own name or the son's name, but attempts by that instrument to discharge even the 39 shares from the obligation which he supposed his son at that time to be under respecting them.

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"In that view of the case, considering the proposition I have finally to make upon this subject, I think I should trespass too long upon your Lordships' time, if I were to go through all the detail of the circumstances in evidence of the cause; that view of the case creates the necessity of considering whether, if these shares were *bona fide* granted at any period to be ascertained to the son, the son must not be taken, in consequence of his subsequent transactions, to have become a trustee for his father; and when the question is so put, whether the son must, in consequence of his subsequent transactions, be taken to have become a trustee for his father, I state again, that which I apprehend would be clear in the law of England, that if you could show that there was the appearance of an absolute gift, but that, at a time subsequent, the son had permitted the father, and particularly for a long course of years, to act with respect to the principal or of the interest, as if he was the owner of the principal; then the mere circumstance of the property standing in the son's name would not determine that the property was not the property of the father.

"Here I wish again to make a distinction, which is extremely important, that although there may be a case, in which the father of any other *cestui que trust*, may, upon the first formation of that trust, reserve what in Scotland they call a *lifereit*, and we in England should call a life interest, yet the trustee who undertakes to prove that the *cestui que trust* had a limited interest, fails in that proof, if the only evidence he can offer is, that the father of the *cestui que trust* was in the constant habit of receiving the dividends, for the habit of receiving the dividends which Mr. Hog the father has taken, is evidence of the absolute ownership in the property which

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cisions, et
Mor. p. 8210.

"I mention this the rather, because I observe that it has been stated in these cases, and very truly stated in these cases, that such has been supposed to be the power of the father, as to disappointing this claim of the legitim of the son, that in the case of *Agnew v. Agnew*, tried in the Court of Session in Scotland, where a gentleman, having several children, some months,—but a few months before his death,—made a disposition, not of all, but of a part of his property, to one of these children, was found to be effectual; at same time, I do not lay much stress upon the circumstance, that it was only a part of his property; for it was a considerable part of his property, and, in principle, I cannot think that it would make a material difference, whether that part had been more or less considerable; but, a very few months before his death, he conveyed all the property, which he detailed, and enumerated in that detail, as a gift, being in *liege poustie*, to one of his sons, and he reserved as against the son his liferent in all the subjects he had so disposed of; his purpose seems to have been, (if it was not avowed, it would be impossible to deny that it would be easily perceived, that his purpose was) to disappoint the legitim, that *that* was his express intention, and that it was to make this conveyance to one *favourite* child, taking care, however, that he should not himself suffer by the act, which he did, because he reserved to himself the liferent; and if a person has not the wish otherwise to dispose of the capital, having the liferent, he is in pretty near as good a situation as if he had the capital at his own disposal. In the Court of Session in Scotland, that question was debated. It underwent great consideration before the Judges of that Court, and, having undergone great consideration before men of great eminence, who then filled the Court, they seem to have been much divided in opinion upon it.

"I have no difficulty in the world in saying, that if the interest of the children in the legitim can be considered as at all analagous to the interest of a child in this country under his father's covenant to leave him an equal share, a different rule would have been followed in that country. Such a covenant obliges the father to do nothing, because, if I agree to leave this noble Lord an equal share with the noble Lord that sits next him,—if I leave this noble Lord nothing, I am under no obligation to leave the other noble Lord anything; and that leaves me at liberty, if I choose to do so improvident an act, to throw my whole substance into the sea.

"But we have construed such a covenant as that so as to make it an act which binds to some purpose, and we have said that a disposition of property, under the circumstances I have mentioned, by a person leaving himself just as comfortably situated with respect to

that property after such a covenant as if he had never entered into that covenant, shall be considered as in truth, though not in letter, a fraud upon the covenant; and this will not be capable of being considered, according to our law, as that species of gift in the lifetime which is to defeat the covenant to leave at the death.

"I refer to this case of *Agnew v. Agnew* for the purpose of saying, with great deference and great respect, that I should wish rather to reserve what would be my opinion upon such a case as that, if it found its way to this House, than to say at this moment, that I should accede to the doctrine. But if the doctrine of that case is the doctrine which ought to be abided by, it seems to me quite incapable of being applied to the present case, as to the thirty-nine shares, or the eighty-one shares; because there is a vast difference in point of fact between a case in which the person who receives the dividends with an express contract, capable of being produced, to show that he receives them by virtue of a limited interest, and a case in which he receives the dividends, exactly as the absolute owner would do, there being no contract produceable to show that it was intended between the parties that he should have but a limited interest.

"There can be no doubt, if I should lay out £20,000 in stock to-morrow, in name of one of your Lordships, though it might be a possible thing, and that you should pay me the dividends for my life, in consequence of an understanding between you and me that I should have the dividends during my life, and you the capital upon my death; yet I conceive, if I were to die, and there was no evidence produceable, but the single evidence that my money had been laid out, and that you, from time to time, had given me the produce of the purchase, that *that* would be quite sufficient evidence to satisfy a court of justice, that, as a trustee for me during my life, you remained a trustee for those who represented me after my death; and it is incumbent for those who have once acted as if they were not the owners of the property, to show under some contract of which they can give evidence, that the inference is to be different from the receipt of the dividends in the one case to what it would be from the receipt of the dividends in the other case. This is a case in which it must be made out satisfactorily, either that Mr. Hog, the father, had parted with all interest in the thirty-nine shares and the eighty one shares, or, on the other hand, in which the judgment of law will be either, that he had never parted with any interest in them, or, if he had ever parted with any interest in them, then the judgment of law will be from the receipt of the subsequent dividends during such a period as he shall appear to have acted with those subsequent dividends, that he had absolutely reacquired a subsequent interest in the property.

"There are some topics addressed to the consideration of your Lordships extremely well worthy of attention, as evidence upon the fact, whether Mr. Hog, the father, did or not receive those dividends,

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because it does not necessarily follow, that because the dividends come into my coffers, that therefore, in looking at the whole of the transactions which take place between you and me, I ought to be said in law to receive the dividends; and it has therefore been urged that Mr. Hog, when he received these dividends, in truth, in a shape paid them out again to the respondent, because they say that he had come to an understanding or agreement with the respondent that he would pay him an annuity of £500, and that having engaged to pay him such annuity of £500, it was natural enough that the father, when he made him a present of these thirty-nine shares, should say, you must take the produce of the thirty-nine shares as *pro tanto* payment of that annuity, from time to time, as the produce arises, and therefore if that produce was brought to the account of Mansfield, Ramsay, & Company in the name of the father, yet that the payments which were made out of that fund in discharge of that annuity carried back the dividends again to the son.

“That may be all very good argument, but it will require a great deal of consideration before you can say it will be convincing argument. The natural quality of such a transaction as that would be this:—If the thirty-nine shares were in the name of the son, and the son received an annuity from his father, the son, who would be permitted to receive the interest and dividends of the thirty-nine shares, would carry them forward as *pro tanto* in discharge of the annuity. But it seems possible, and perhaps rational to admit of a perfectly different consideration, if your Lordships perceive that these dividends are carried in a mass into the same drawers of the banker's house which contain that which is undeniably the property of the father; if they are placed in a *congeries*, in which the one is incapable of being distinguished from the other, there can be no doubt, in point of law, they would to many purposes be the property of the father, and till they became severed by actual payment out again of the annuity, all which were so carried into this mass would be the property of the father, liable to all that could act upon the property of the father. Therefore, these were certainly permitted, for a period at least, by the son, to be laid hold of by the bankers of the father, as the property of the father; and, when looking to see what is the true intent and meaning of all this, you must look at all the other circumstances in the case, and if you find the father advancing the expenses of the transfer—if you find the father advancing the subscriptions for those shares put into the name of the son; if you find the father estimating his property, and in that estimate of property, attributing to himself the ownership of this property; these are all circumstances which must be considered when you are determining whether the dividends on these shares were taken into the coffers of the father's banker, in consequence of any agreement or understanding between the father and the son, that they should be paid out again in discharge of this annuity.

"It is contended here, that it does not signify at all what had been entered in the father's book with respect to the estimate of his property; but that is perhaps a proposition much more easily laid down than assented to, when the allegation here is, not the mere question between the father, who was the truster, and the son the trustee,—a question to which all the rules of evidence about trusts will naturally apply—but whether the transaction between the father and the son were transactions which, in point of fact, were intended between the father and the son, to disappoint this claim of legitim; for a great many circumstances will, in such a case, be circumstances admissible as evidence, which circumstances would not be admissible as evidence if it were a dry question under the act 1696, whether there was or was not a trust as between the person alleged to be the truster, and the person contending that he was, in truth, the *cestui que* trust.

"Under all these circumstances, therefore, I conceive the true question with respect to the thirty-nine shares, will be this, How many of these thirty-nine shares (attending to the date which the circumstance gives with respect to the transaction relating to the directorship), how many of the thirty-nine shares will really fall under the effect of that transaction? and, with respect to those which would not fall under that transaction, as well as with respect to those which did fall under that transaction, whether the subsequent dealings between the father and the son do, or do not, amount to evidence, that in the subsequent life of the father and the son these shares were considered as the property of the father, at least to the extent and the purpose of the father's receiving, from time to time, and I mean for himself beneficially receiving, and receiving as his own property, the interest, dividends, and produce of those shares. If it should turn out, upon an accurate examination of the fact, that he did receive *eo modo et eo intuitu*, and the son permitted him to receive *eo modo et eo intuitu*, it will be to be determined what is the effect of that subsequent dealing with respect—first, to the shares which qualified him to act as a director, and with respect to which the oath was taken, and with respect to those shares which are not professed to have been transferred for that purpose.

"In some points of view in which I have taken the liberty of representing this case, as to the thirty-nine shares, this case does not appear to me to have been very fully examined into, and I am more anxious to state it in this way, because, in a subsequent case of *Millie v. Millie*, it seems to be admitted by the Court of Session, Mor. p. 8215. that though the father may ostensibly part with his property, and June 7, 1803. allow it to stand as the property of the son; yet if, in truth, after Affirmed on Appeal. he has so parted with that property, he really and substantially remains the owner of it, *that* will not defeat the legitim; and I am the more anxious so to state it, because, comparing the note in the case of *Millie v. Millie*, containing the opinion of the Judges, to which

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1804. we look on these occasions, I observe that the case of *Agnew v. Agnew*, to which I have before alluded, is a case not only extremely doubted of by every high authority in the Court of Session, but I presume there must be some inaccuracy; for in the case of *Hog v. Lashley*, the opinion seems to represent that if *Agnew v. Agnew* has established a doctrine which would govern the decision in this case, the very same authority, if these notes in *Millie v. Millie* are accurate, is made to state *that* to be a decision, with which the decision in *Millie v. Millie* would not agree; but whether *Agnew v. Agnew* is to stand or not, for the reasons I before mentioned, as it seems to me, it cannot govern, when, upon the examination of facts, there is nothing to prove a limited interest (the conveyance being absolute) but the mere circumstance of receiving dividends after that conveyance had been made.

“ Having said this much as to the 39 shares, the 81 shares fall certainly under a different consideration, and the 81 shares cannot be affected by considerations suggested by any of the documents to which I have been alluding, unless as far as they can be barely affected in reason upon the question, whether they are mine or yours, without attending to the circumstances of dealing that took place as to the 39 shares, and that took place as to the 81 shares before the 81 shares were transferred, in the manner I am about to mention, by Hog the father to Hog the son.

“ It appears clearly by the instrument, of the date to which I have before referred, that these shares were intended by the father to have been laid out in land; that Mr. Hog intended that these 81 shares should have been vested by trustees in the purchase of lands, to be subject to the same species of entail as the estate at Newliston.

“ Between the date of that deed and his death, and so shortly before his death that no dividends were received between the date of the transfer and the death, he transferred them apparently absolutely to Mr. Hog the son. This must have been either to give them to Mr. Hog the son absolutely, or to give them to Mr. Hog the son under a confidence and an understanding that he, Hog the son, was to make the same disposition of them as the trustees were empowered and required to make of them, by the deed of disposition he had before made.

“ I believe there can be no doubt that if the father intended absolutely to give them to the son whilst he was in *liege pousie*, that it was competent for him to do so; and if there were nothing more in this case than the mere circumstance of his having made the gift to the son so soon after having before intended to give so large a portion of his property to that very son, to be laid out in land to be settled upon that very son, however much your Lordships might suspect about that transaction, suspicion will not do as a ground of judgment, as it was competent for the father to alter his purpose,

and by that act he sufficiently proved that he had altered his purpose, that that which he had a power to give away he had effectually given away, and you would have had nothing for the mind to address itself to, in order to consider whether this was really and absolutely a gift or not, excepting this circumstance, that in times past, after that stock which had stood in the name of the son, had in truth been dealt with by the father as his own, though it did stand in the name of the son; and you would have to put the question to yourselves, whether you could safely in judgment conjecture that he meant to deal with the 81 shares as he had dealt with the other shares: that is, that though he placed them in the name of his son, he meant to deal with them as if they were his own property; and I humbly submit my opinion to your Lordships, that whatever you might suspect out of a court of justice, it would be much too strong to suspect in a court of justice, that *that* which was upon the face of it a gift, was not intended to be a gift, before you had seen any other transaction consequent upon it which authorized you to say so; that because the 39 shares were so dealt with, if they were so dealt with, therefore the 81 ought to be so dealt with, and therefore they ought to be considered as the father's. But, to explain myself upon this subject, and I wish to do this in the presence of my noble and learned friend who sits near me, I do conceive that in this country, after the transfer of these 81 shares, if they had been shares in the Bank of England, if a day had come in which the son had received a dividend for the father's use, that one single receipt of the dividend for the father's use would have been evidence, upon which you would have been authorized to say, that the receipts of the dividend for the father's use proved that the property which produced those dividends was the father's property, and that, in that case, it would not have been competent, and I wish to mark the circumstance again, that, in that case, it would not have been competent for the son to have said, provided he put it upon no other evidence than that this was a payment during the father's life, that it would not have been competent for the son to have said, because this was a payment in the lifetime of the father, therefore the interest of the father was, in the intendment of the law, in such circumstances, to be taken to be only an interest during the father's life. I conceive, on the contrary, that the receipt, in such circumstances, would prove property in the principal, because it proved property in the interest, and that limited sort of interest would not have been contended for on behalf of the son; but it happened in this case that the father died before any interest was received at all; and it will be for your Lordships to say, attending to the circumstances and transactions between these parties previously, whether there was anything more than a transfer by the father to the son; and if there was nothing more, in this case, it would be too bold to say so; but there is something more in this case, which has reference to this law of legitimation, a consideration so important in the view I take of the case, I

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1804. **LASHLEY, &c.** should have to lament that it had not been considered with reference to the fact I am now about to mention, considered in every place in which it could be fully and truly considered, what would be the effect of such a circumstance upon the law of legitim? and it seems to me to come distinctly to this, that if the deed of disposition which had devoted this property to be laid out, after the death of Mr. Hog the father, in the purchase of lands at Newliston could not take effect, the question then is, whether the transactions I am about to state would do so, provided the evidence proves that such was the nature of that transaction,—whether he who, by this disposition, had intended that these funds should be laid out in lands, could, by saying, I will not permit my disposition to take effect, but I will give this money in my lifetime to my son, nevertheless with an understanding, and with a confidence that he shall lay out the property in the purchase of lands at Newliston as I have directed money to be laid out in that neighbourhood, and whether a gift, connected with such an understanding and confidence as that, would or not be sufficient to deprive the younger children of their title under the legitim? If it would, it appears to me that the case of *Millie v. Millie*, which was afterwards decided, will deserve a great deal of consideration, because that is neither more nor less than saying this, that in one shape, after an ostensible transfer, you may hold over your property pretty nearly an absolute dominion; and that, in the other case, after such transfer, you cannot hold dominion over it but subject to the claim of legitim. In the case of *Millie v. Millie*, it was held, that the parent going out of partnership, but still leaving the firm to go on in name of the son; it being understood between the father and the son that the father had an interest, that this did not disappoint the legitim. It does appear to me, upon the principles of the case of *Millie v. Millie*, to deserve a great deal of consideration indeed, whether, if the gift of 81 shares to the son, was a gift for the purpose of being laid out in land, to be settled after his death by the son, to whom he had given it in his lifetime; and, if that was the purpose, whether it shows he meant to retain power over it? If it was his purpose to lay it out, after his death, it does not exclude the idea that he was to enjoy it, as he had heretofore enjoyed it, during his life; the question then will be, whether, by a gift under such an understanding as that, the legitim may be defeated?

“The proof of the facts upon this point of the case depends upon the evidence of Mr. Ramsay, the banker of old Mr. Hog; who seems to have been much in the knowledge of the intentions of this gentleman; and who, in that deposition, gives his account of this circumstance, with which I think it would be quite impossible, in this country, that any court of justice could be satisfied. I will read to your Lordships both parts of Mr. Ramsay’s deposition. In the first instance, when he is examined as to the interrogatory which relates to this matter, ‘Do you know that, shortly before his death, Mr.

‘ Roger Hog executed a transfer in favour of Mr. Thomas Hog, and what shares did he transfer? Do you know the terms upon which this transfer was made, or the cause of making it? he depones, that a short time before Mr. Hog’s death he told the deponent that he had received some anonymous letters of a very scurrilous nature, and which he supposed to have come from the pursuer.’ The pursuer is the party who is claiming in right of his wife this legitim; and there can be no doubt that if he had received a letter of a scurrilous nature, he was fully at liberty to disappoint that claim of legitim; but whatever was his purpose, he could not execute that purpose except in the way in which the law would allow him to execute that purpose.

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“ Then Mr. Ramsay goes on to say, that he had made a transfer of his bank stock to his son, in order to prevent the possibility of its being attached, as mentioned in those letters. That the deponent believes there were no conditions annexed to the above mentioned transfer, and that Mr. Hog took it for granted that his son would fulfil what he knew to be his intentions of vesting the money in land, and entailing it in the same manner with the rest of the estate. Depones, ‘ That Mr. Hog told the deponent that he had executed a trust disposition, vesting his funds in Lord Henderland, Mr. Robert Mackintosh, and the deponent, to be laid out in the purchase of land, which was to be entailed in the same manner as the rest of his estate, but that afterwards he had acquired more confidence in his son, and had contented himself with taking the promise of his son that he would fulfil his intentions, and would consult with Lord Henderland, Mr. Mackintosh, and the deponent.’ And then when Mr. Ramsay comes to the close of his other deposition, he states himself thus: ‘ That sometime before Mr. Hog’s death, he transferred a considerable number of shares of stock of the Bank of Scotland to his son, which the deponent believed to have become from that hour, as much, and to all intents and purposes, the sole property of the son as if the father had given him the value in cash out of his pocket; that he also believes this transfer, or the giving away in his own lifetime, and with his own hand, was in consequence of the anonymous letters, and of some new opinions which prevailed at that time with regard to moveable property; and the deponent believes the only reason Mr. Hog had for keeping any shares in his own name, was merely to act as a director of the bank, in the event of his again being requested to accept of that office. Depones, That he has reason to think that if Mr. Hog had conceived that his English funds would not have been carried by the settlement he had made, he would also have transferred them to his son.’

Now, your Lordships will permit me to say, that I think it would have been utterly impossible for the Court of Chancery in this country, which is obliged either to content itself with certain depositions, or

1804. to take the means of making further inquiry, to have been contented with such depositions as these. I take them to be (I hope I am not mistaken in that circumstance,) I take them to be the depositions of the same gentleman ; but I confess, those depositions surprised me very much, for, when Mr. Ramsay, in his last deposition, says, that he believes those to have become, to all intents and purposes, the sole property of the son, as if the father had given him cash out of his pocket ; and that his only reason for keeping any shares in his own name was, to act as a director of the bank, in the event of his being again requested to accept of that office, and that, he has reason to think, that if Mr. Hog had conceived that his English funds would not have been carried by the settlement he had made, he would also have transferred them to his son, one cannot help referring back to the former deposition of Mr. Ramsay ; and, with respect to the former deposition of Mr. Ramsay, your Lordships will recollect the English funds and the Scotch funds were given by the same settlement for the same purposes. Mr. Ramsay has expressly stated, that whatever might have been the opinion of the deceased, with respect to the pursuer's letter, and though that allegation had led him to place these funds in the name of his son, yet, he says, that Mr. Hog, the father, himself told him, that he contented himself with taking the promise of his son that he, the son, would fulfil his intention. That is not all ; but the promise which he takes, is a promise, not only generally, that he would fulfil his intention ; but it represents the son as promising his father that he would consult with others, as to fulfilling this intention ; and with whom would he consult ? Why, that he would consult with Lord Henderland, Mr. Mackintosh, and Mr. Ramsay himself.

“ According to Mr. Ramsay's deposition, Mr. Hog had executed a trust-disposition, vesting the funds in Lord Henderland, Mr. Robert Mackintosh, and the deponent, to be laid out in the purchase of lands to be entailed, together with those English funds, which English funds, Mr. Hog had been advised could not be touched by the law of Scotland as to this legitim, as was contended for many years, till otherwise decided in this House. And then the question is, Whether the fair inference from the whole be not this—that this was a gift by the father to the son, not in the sense, that it was to become the property of the son absolutely, but a gift by the father to the son, for the purpose of the son laying out this property in the purchase of lands to be entailed in the same manner as his estate at Newliston ; placing the property in lands in which it would be safe from the claim of legitim—as safe from the claim of legitim as those English funds were supposed to be. I state this, because it appears to me a question which deserves a great deal of consideration in this place, and would, I think, require great consideration elsewhere, whether it be possible that a father in Scotland, the moment before he dies, can hand over to his son apparently that pro-

perty, for the very purpose to which he could not devote it by a trust-disposition, either made whilst he was in *liege poustie* or made after he was not in *liege poustie*.

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“ My humble opinion upon that is, that it would be absolute destruction to the law of Scotland, as far as it relates to this claim of legitim, if that could be done. The course, therefore, I should propose to take, would be, to come to some declaration of the principle which we conceive to be the principle of law that should govern in this case of legitim, and then call upon the Court of Session to apply the facts, as they are proved before them, or make such examination as may be necessary, in order to enable them to ascertain the fund to which the principle is to be applied, and to apply that principle of law so to be laid down in your Lordships' judgment ; and it does seem to me it should not fall short of this,—that the receipts of the profits during the life of the person is evidence of the ownership of that person in the subject matter which produces the profits. And it seems proper for me to state, that without prejudice to what ought to be the determination in such a case as *Agnew v. Agnew*, if such a case should ever arise again, your Lordships will, at least, go the length with me, (guarding it against any such case as that to which I have referred,) in stating, that if any number of shares were placed in the name of the son under an understanding that the son was to execute the purposes contained in that trust-deed, such a disposition as that would not be sufficient to defeat a claim of legitim. When it is said, in this case, that *that* was no more than a declaration of the father—it will be open to the Court of Session to consider what weight is due to this observation, where the question is, whether the father and the son are together acting a part, in order to defeat third persons, and Whether the declaration of each must not be evidence ? I think it must be evidence as between third persons, and a father and son, who are both to be considered as an adverse party to those third persons. When I say, I think it would, I am only stating the opinion which I at this moment entertain, but it will be open to those who have to reconsider this case, to say whether I am right or wrong in the opinion I at this moment entertain upon this point. In this way of considering the question, your Lordships will, in point of fact, have settled some material points, both on the law of evidence and the law of legitim, as far as the law of legitim is affected by a transaction of this kind, being a material part of the law of Scotland.

“ The other questions which arise here are of minor consideration. The other The first is, with respect to the respondent, Thomas Hog, being a questions. creditor for the value of the estate which his father had purchased in this country, which became his by the appointment of his mother, which was afterwards sold, and the father received the money. It is Father debtor very difficult to suppose that, in the course of so many years of the to the son for lives of both, spent after that transaction took place, that somehow or his mother's other it was not very well understood between them, that the father English estate.

1801. was not a debtor to the son for that sum of money ; but we must not take that for granted, the transaction clearly constituted the son a creditor to the father ; and unless it can be shown, far beyond what appears from mere conjecture or supposition, that *that* relation of creditor and debtor was made to cease and discontinue by some satisfaction or some agreement, we must act upon the fact as it originally was ; for we are not authorized to say, that the nature of it was changed, unless that change be distinctly proved. It appears to me, therefore, that this appeal is groundless, so far as it quarrels with the Court of Session in considering Thomas Hog as a creditor for that sum of money.

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Sums received by Mrs. Lashley and the annuity to be deducted, but only from the legitim. “ I am also of opinion, that regard must be had to the sums which were received as provisions for Mrs. Lashley, and the annuity paid to her ; and it will be observed by your Lordships, that the effect of the decree is that they shall be brought into collation. This decree or interlocutor, supposes that more than one younger child might be entitled to the legitim ; but if there be a well grounded apprehension, (as, from what has passed in this House, there may be, I say no more than that there may be), that only one child will be entitled to legitim, if your Lordships gather the words of the interlocutor aright, that collation is to be only with respect to the legitim. Whoever will finally receive the legitim will receive the benefit of that collation ; if more than one receives the benefit of legitim, more than one will receive the benefit of the collation ; if only one turns out finally to be entitled to the legitim, the collation cannot prejudice the estate of that child, because it would then be collation only to itself, for, as I read the books, the collation is between those who are entitled to the legitim.

Also of the debt of £700. “ There is another circumstance of a debt of £700, that, as a debt, will fall to be so dealt with. There will be no difficulty then, in providing for the differences in reference to these smaller considerations I have been now stating to your Lordships.

Expenses of confirmation and probate.

“ I would beg your Lordships’ particular attention to that part of the case (though it is not a matter of very considerable value) which relates to the claim with reference to the expenses of confirmation in Scotland and of the probate in England. I can have no manner of doubt in the world, that if a person die in England, as may happen in some parts of England to be the case, when a wife or a child have a claim against his property, as wife or child, or where a part of his property may be undisposed of by his will, and when the wife, therefore, as wife, will take a share in the undisposed part—and the child take a share in the undisposed part—yet, inasmuch as no part of this property can be touched, but either wrongfully or rightfully, and as it ought not to be touched wrongfully, but ought to be administered rightfully, as no part of his property can be touched, if he has made a will, but by his executor—or if he has made no will, but by his administrator, the expense of clothing

the individual who is to act as such with the character which is to enable him to act as such, is an expense for the benefit of the whole estate, however distributed ; and, therefore, as it seems to me, *that* expense should fall proportionally on the whole estate ; whether that which respects confirmation in Scotland falls under the same principle I perhaps am not so competent to judge, but I should conceive that it would. The question then is, Whether, in stating my own opinion to your Lordships, I should state that these interlocutors are right or wrong, and I do say that the inclination of my opinion as to both is, that they are wrong.

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“ Then this circumstance occurs, and your Lordships must deal with it, regard being had to the circumstance that the cross appeal in this cause, which raises two points, the one not necessary to be raised by the cross appeal, as I had occasion to observe yesterday, in the question about domicile, because that was necessarily included in the discussion and argument upon the other appeal ; and the other, in respect of the expenses of the probate and confirmation which is raised by the cross appeal : but, unless your Lordships choose to relax your general rule, this matter is not properly before you. How far you may choose to relax your rule, is a matter of infinitely greater consequence to the House than a question of such a value as this can be to the parties now litigating at your Lordships’ bar,—the difficulty will be where you are to stop ; this, however, must be left to the sound judicial discretion of your Lordships ; and, when the question comes to be put, Whether the interlocutor should be reversed ? as to so much of that subject, your Lordships’ opinion will be to be taken on this point.

“ Your Lordships will observe, that this leads me finally to say, that I have nothing to propose but the change of interlocutor respecting the domicile of Mr. Hog. It will be for your Lordships to decide, whether it is fit to adopt that proposition, that there should be a change of the interlocutor, as far as it is founded upon the notion, that the marriage in England must decide the rights of the wife when she is transplanted to Scotland, and her husband’s domicile is established there. But with respect to the domicile of the husband in the year 1760, it does not appear to me that there is any occasion to alter the interlocutor as to that part.

“ With respect to the price of the Kingston estate—with respect to the sum of £1000 upon bond—with respect to the £700—and with respect to the provisions which have been made for Mrs. Lashley, your Lordships will see, that if the interlocutors are to be altered at all, it will be an alteration rather in terms than in substance, an alteration which only clearly marks out how the collation is to operate, regard being had to whether it shall finally be one person or more than one who shall be entitled to legitim ; and, with respect to the question upon the 39 shares and the 81 shares, that it is fit for your Lordships to declare as matter of law the principles of evidence, and

1804. the rules which should obtain as to what shall or what shall not be
 LASHLEY, &c. taken to be *inter vivos* a sufficient disposition of the property, to render
 v. the property no longer capable of being considered as the moveable
 HOG. property of the testator at the time of his death. Calling upon the
 Court of Session to act upon that part of the case, upon that declaration, and to determine whether they can or cannot, upon the whole of the case, say that this property was not in the perfect enjoyment of Mr. Hog, and that the purpose of the transfer was not under an understanding between the father and the son, that *that* property should be applied to the purchase of land to be settled by entail in the same way as the estate at Newliston, of course giving their distinct attention, as they have been before called upon to do, to the 39 and the 81 shares.

“ I hope your Lordships will allow me to state, that I have thought it better to go through the case at great length, stating my opinion upon the different parts of it, than to draw out the judgment in form, before I knew whether your Lordships concurred with me in the opinion I have humbly stated; if it should be your Lordships’ opinion so to do, it will not be difficult then to draw up the terms of such judgment as your Lordships may think proper to give upon the whole of the case. Therefore, for the present, I shall content myself with saying what I have done, expressing, however, a wish that the noble and learned Lord, who has given great attention to this case, will be pleased to say how far he does or does not concur with me, because it will be very satisfactory to my mind, recollecting how long he has been in the knowledge of the law of that part of the island as well as this,—if his Lordship should be of opinion that I have not mistaken the true view of this case; and, on the other hand, most thankfully shall I receive any information that may fall from the noble and learned Lord that may tend to set me right, if in any respect I am mistaken in the principles I have laid down.”

LORD ROSSLYN.

“ I have the satisfaction entirely and absolutely to concur with the noble Lord who has just sat down.

“ I am sorry to observe, that, in the proceedings of the courts below, there have occurred, in my opinion, several mistakes in point of law, particularly in that interlocutor which finds that the circumstance of the marriage being celebrated in England can decide upon the rights of succession that will arise to the wife and children of that marriage according to that law, which by the future events of the life of the party may be the law of the land, to operate upon his property at the time of his death. I think there are many errors that have misled the judgment of the Court upon this point.

“ In the first place, in this case there is no express contract; and I have no conception, in point of law, that a lawyer is to entertain a

metaphysical idea of an implied contract, arising from the situation in which the parties place themselves by a civil act. My general idea of law is, that in all cases where parties make an express contract, that excludes all consideration of an implied contract. An idea of an implied contract, in all cases where there is an express contract, is to me a solecism.

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“ But, supposing there had been no legal contract, and you were to determine upon the situation of the parties upon the mere fact of a marriage celebrated in a given place, they had no occasion to raise an implied contract. A man and a woman are united together; they take their chance of the future fortunes of each other, and particularly with regard to the wife, who can have no domicile separated from the domicile of her husband; she must follow the fortunes of her husband wherever they happen to be placed, and must take her chance at the time when his fortune falls under the disposition of a particular law. Therefore, in the general case, there is no foundation for that; and I am sure my noble and learned friend will see the application of this observation in almost every case where that occurs, that a metaphysical idea of an implied contract is a fallacious idea, substituting an imaginary idea, not applicable to the actual situation and relation of the parties.

“ With respect to the claim of the appellant, in right of the mother, to that share of the estate which the law of Scotland gives, under the name, not very properly applied, of *jus relictæ*, I am of opinion, with the noble and learned Lord, that the interlocutor ought to be reversed.

“ But upon that being reversed, there comes a matter of great consideration with regard to property,—the claim of legitim to the children. Now I take it that I have never learned, or that I have forgotten the law of Scotland, if I do not know that the father has a full power to dispose of his personal property in any manner he pleases. He may convert it all into land, and by that means the younger children will be defeated of their legitim, but then he must do the act himself. He must himself purchase the land, because the nature of the property that becomes the property, either of the right heir or partly of the younger children, must be judged of at the time of the death of the father. Therefore, according to my idea of the evidence in this case, but I do not mean to say it is not a matter open to inquiry—for I will not presume to know so much as some others may do on this subject—I should say that Mr. Hog’s intention to have either his stock in the Scotch bank, or the funds in England, laid out in land after his death, by any stipulated alienation of them from him to his son for that purpose, is totally void in point of law, and can have no effect with regard to the disposition that he might make of it. He might do the act in person—he might give a provision to a child in his lifetime, without any consideration what might be the state of his moveable property at the time of his death, and that, when actually given, could not be

1804. recalled. He might advance one of his children to a certain situation in life—he might lay out his money expensively on his education—he could not be hindered from it—but he must actually give the money with which this would be done—he must divest himself of an interest in it, and he cannot retain that interest to the moment of his death, consistently with law. Therefore the case of *Agnew v. Agnew*, I think, is totally wrong in law, (I have no scruple to say so), and a bad decision. I should not be so moved by that decision as to send this case back to the Court of Session for reconsideration, but, when I am to pronounce upon a case, where there are a great many papers, and a good deal of evidence which I have not examined with attention, I do not wish to apply the law in this case, but, as far as I know the evidence, and can judge of it, I think it clear that, as between Hog the father and Hog the son, there was a disposition and an understanding to reduce the claim of legitim, with a view to prevent the wife of the appellant from having that claim, which she would otherwise consider herself to be entitled to.

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“ With regard to the debts contracted by the father, in consequence of the son’s paying him the price of the estate he was entitled to by his mother, the son is fairly entitled, as a creditor, to stand upon the moveable estate of the father, and to receive the value of the estate at Kingston, and the bond of £1000, before any distribution of it can take place.

“ I think there is a mistake in the interlocutors of the Court of Session, with regard to a trifling sum—the expense of the probate in England and confirmation in Scotland. They are both sums of money laid out, in order to acquire a legal title to that property which is to be distributed. Somebody must lay it out—and it is no matter whether the son or any body else had done it. But I think, my Lords, that the rules of your Lordships’ House, in the case of appeals, ought to be strictly adhered to, and this may be still more trifling in the result, because it may happen that the share of that fund to be divided may come to be equal, which I think will very probably be the result of this case. But he certainly has a legal claim on the fund for those expenses.”

It was declared by the Lords, &c.

That the contract of marriage between the late Mr. R. Hog and his wife, is not so conceived as to bar a claim to legal provisions; and that Mr. Hog is to be considered as having his domicile in Scotland at the time of his wife’s death; and that the pursuer has therefore a claim, in right of her mother, the wife of the said Mr. Roger Hog, who, at the time of her death, had his domicile in Scotland, to a share of the moveable estate of her father at the time of her mother’s death, and the

Lords do also declare that such shares of the stock of the Bank of Scotland, standing in the name of the respondent Thomas Hog, at the death of the said Roger Hog, as shall appear to have been transferred to the said Thomas Hog, under any agreement or understanding that he would invest the same in land, after the death of the said Roger Hog, and also such shares, the dividends whereof shall appear, notwithstanding the transfer of the same, to have been, after such transfer, ordinarily received for the account, and applied for the use of the said Roger Hog, ought to be considered as subject to the pursuer's claim of legitim; And it is therefore ordered and adjudged, That all such parts of the interlocutors complained of in the said appeal, as are inconsistent with these declarations, be, and the same are hereby reversed, and, in so far as they are agreeable thereto, the same be and are hereby affirmed: And it is further ordered, that the same be remitted back to the Court of Session in Scotland, to ascertain whether any, and which of the shares in the Bank of Scotland, agreeably to the declaration aforesaid, are subject to the pursuer's claim of legitim, and also to ascertain the interests of the pursuer in her father's estate, at her mother's death and at his death, regard being had to this declaration: And it is further ordered and adjudged, That it is unnecessary to consider so much of the matters complained of in the cross appeal as relates to the domicile of the said Roger Hog, touching which, such declaration hath been made as is herein before contained; and the said appeal also not having been presented in due time, it is further ordered and adjudged that the same be, and is hereby dismissed this House.

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For Appellant, (Mrs. Lashley), *Wm. Alexander, John Clerk, Geo. Cranston.*

For Respondent, (Thomas Hog), *Edw. Law, Samuel Romilly, Henry Erskine, John Connell.*

NOTE.—This case is noticed in Mr. Robertson's excellent treatise on Personal Succession. The Lord Chancellor's speech is printed in the Appendix to that volume, but inaccurately. It is here given in a corrected form

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<hr style="width: 100px; margin-bottom: 5px;"/> ARROT v. KER, &c.	JAMES ARROT, Surgeon, Edinburgh, JAMES KER, Manager of the Leith Banking Company, JAMES MACLEAN, Merchant in Edinburgh, and THOMAS GORDON, Writer to the Signet,	<i>Appellant;</i> } <i>Respondents.</i>
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House of Lords, 17th July 1804.

BANKRUPT—COMPOSITION—CAUTIONER—33 GEO. III. c. 74, § 49.

A person having become bankrupt, entered into a contract with his creditors, whereby they agreed to withdraw the sequestration, upon condition of his paying 12s. 6d. per pound, proposed to his creditors some time before, in a previous arrangement, he paying all the debts contracted subsequent to that date in full. This was agreed to. He applied for his discharge, without having paid the respondent's claim in full. In an action against his cautioner, held that this was not a contract preferring one creditor to the hurt of the others, and so not struck at by the act 33 Geo. III. c. 74, § 49.

Angus M'Kinnon, upholsterer in Edinburgh, having become embarrassed in his circumstances, offered his creditors a composition of 12s. 6d. in the pound, with his father's personal security, and a conveyance in further security of certain of his stock, until the composition should be paid. This offer was accepted by the creditors, upon condition of the whole other creditors agreeing to the measure, and they agreed to grant him a discharge.

Sometime thereafter, a few creditors, who had not acceded to the composition, threatened diligence; and, to prevent them obtaining a preference, it became necessary to apply for sequestration, which was accordingly awarded, of this date. After the usual statutory requisites were gone through, a meeting of the creditors was called, at which it was agreed, by a great majority, to follow out the agreement formerly entered into, and to withdraw the sequestration, upon condition of Angus M'Kinnon finding sufficient caution for payment of the composition of 12s. 6d. per pound to the creditors who were parties to the first agreement, and to pay all the debts which had been contracted posterior to that date in full.

The debtor's father, Daniel M'Kinnon, and James Arrot, surgeon in Edinburgh, the appellant, became the cautioners,

and bound themselves by bond, conjunctly and severally, to pay the composition of 12s. 6d. in the pound to the one class of creditors, and the debts in full to the others.

Among the debts contracted by Angus M'Kinnon, subsequent to the voluntary trust-deed and agreement in 1793, there was a bill due by him to John Maclean for £97. 2s., and indorsed by him to James Ker, manager of the Leith Bank, by whom it had been discounted previous to the sequestration, upon the faith that the voluntary trust-deed and agreement had been acceded to, and M'Kinnon discharged.

When the sequestration was applied for and awarded, and the creditors had agreed to recall the same, on the arrangement above set forth, namely, that all creditors subsequent to the first agreement were to be paid in full, Mr. Ker did not doubt that his claim fell within those that were to be paid in full; but, in order to put the matter on a secure footing, his agent addressed a letter to the trustee, Mr. Gordon, as follows:—"Mr. Ker, manager of the Leith Bank, is a good deal alarmed that an application has been made to discharge Angus M'Kinnon's sequestration, and about which he says he never was consulted. I have just now seen a copy of the petition and of your report; and from the report, as well as what you once said to me, it appears that all debts contracted by him after March 1793 are to be paid in full; and that those contracted prior to that date are to be compounded at 12s. 6d. If this is the case, Mr. Ker cannot object to the prayer of the petition; but as he wishes to know explicitly how the matter stands, and means to oppose the petition unless matters are regulated as I conceive them to be, I beg you will be so good as write me a line immediately, and mention whether the creditors, after March 1793, are to receive full payment."

The answer to this letter was:—"As authorized by Angus M'Kinnon and his cautioners, I now agree that his debt to the Leith Bank, per £97. 2s. shall be comprehended among the debts which, by the bond of caution granted for the composition to his creditors, are to be paid in full, and shall be *so paid, agreeably to the terms of that bond accordingly.*" Upon which Mr. Ker consented to the recall of the sequestration.

Mr. Ker not having received payment, raised action against the cautioners of M'Kinnon, and against Thomas

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1804. Gordon his trustee, narrating the whole circumstances above set forth, and concluding for full payment of his debt. The defences stated by the cautioners were, 1. That the bill libelled for, does not fall under the cautionary bond; and, 2. That they gave no authority to Mr. Gordon, the other defender, to write the letter above quoted, and therefore it could not affect them. Separate defences for Mr. Gordon set forth, That he acted merely in a ministerial capacity, as agent for the other parties; and that he was warranted in writing the letter to Mr. Adair, agreeing that the bill should be paid in full.
- Jan. 14, 1800. The Lord Ordinary pronounced this interlocutor:—
 “ Finds that there is no sufficient evidence that the bill sued for was not the proper debt of Angus M’Kinnon the acceptor, and therefore adheres to the former interlocutor, repelling the defences; and further, finds the defender, Thomas Gordon, in consequence of the action of relief brought by him against the representers, Messrs. M’Kinnon and Arrot, entitled to be relieved, and decerns accordingly.”
- May 28, 1801. On reclaiming petition the Court adhered,
 June 9, 1801. finding Gordon also entitled to his expenses of establishing his claim against Arrot.

Against these interlocutors the present appeal was brought by the appellant alone.

Pleaded for the Appellant.—The transaction which gave rise to this action is expressly condemned by the bankrupt law, because it is contrary to the spirit and express words of the statute, that the onerous creditors of M’Kinnon should consent that Ker, the holder only of an accommodation bill, should receive payment in full, while they only received payment at the rate of 12s. 6d. per pound. This being the case, it was clear that Ker, having accepted without the knowledge of the other creditors, an obligation for full payment, forfeited his debt under the bankrupt statute, 53 Geo. III. c. 74, § 49, which declares: “ And if it shall be proved that any creditor has privately accepted of a gratuity or higher composition for giving his concurrence to the measures proposed on behalf of the bankrupt or his friends, he shall forfeit his debt, and be liable in restitution of what he has received.” It is, besides, clear that the appellant, by the bond, was only bound to pay, “ in as far as they were the proper debts of the said Angus M’Kinnon.” These words, as well in legal as in common language, must clearly apply to all obligations

whatever, which were *truly* granted on account, or for the accommodation of others, without any value received by Angus M'Kinnon himself, whether that appeared *ex facie* of the obligations themselves or not. That it was so understood by Mr. Ker, the manager of the Leith Bank, to whom the bill was indorsed, as well as by Mr. Adair his agent, the respondent Thomas Gordon, by whom the bond was drawn, and the two M'Kinnons, is evident beyond all question from the foregoing correspondence. Were this matter of doubt, the bond, being a cautionary obligation, ought to receive a strict interpretation, and therefore *in dubio* to be construed in favour of the appellant. Supposing therefore Mr. Ker to be an onerous indorsee, and as such entitled to recover as against Angus M'Kinnon, whatever objections the latter might have had against payment of the bill in the hands of John Maclean, it did not therefore become the *proper debt* of Angus M'Kinnon within the meaning of the bond. It was an accommodation bill for M'Lean. The bill is now his, and the debt his—Angus M'Kinnon being only a surety. Further, the respondent, Thomas Gordon, had no authority whatever from the appellant to enter into the illegal transaction alluded to, and therefore he is entitled to be relieved against the effect of his letter. Mr. Gordon had no mandate or power so to communicate before calling a meeting of the creditors. Had he done so, they would have resisted, and had the appellant known that the bankrupt had agreed to pay Ker in full, he would have withdrawn his security.

Pleaded for the Respondent.—The appellant, by his bond of caution, bound himself to pay in full the proper debts of Angus M'Kinnon, contracted subsequent to the date of the first agreement with his creditors; and the debt in question, in which Angus M'Kinnon, as acceptor of the bill, was bound to the Leith Bank, as principal debtor, and not subsidiary as cautioner for the drawer, being a debt so contracted, and the proper debt of Angus M'Kinnon, it fell to be paid in full. In the strict legal interpretation, Angus M'Kinnon was the proper debtor to the Leith Bank, and not John Maclean, the indorser of the bill; so that, apart altogether from the special circumstances attending this case, the debt was one comprehended under the appellant's bond of caution. Were there any doubt, the transaction, and the manner in which M'Kinnon's trustee dealt with Mr. Ker in the matter, expressly assuring him by letter, on a threat to oppose the application to recall the sequestration

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1804. unless satisfied on the subject, that his debt was one of those which the bond provided to be paid in full, and his consent to the recall, in consequence of this assurance, were sufficient to support his claim. And it is no answer to this to say that Mr. Gordon's actings were unauthorized, because, as trustee, the respondents were bound to look upon him as acting for the creditors.

MONCRIEFF
v.
CUNNINGHAM.

After hearing counsel, it was
Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *W. Adamson, David Williamson.*

For Respondent, *Wm. Alexander, John Clerk.*

NOTE.—Unreported in the Court of Session.

ROBERT SCOTT MONCRIEFF, Esq.,	<i>Appellant;</i>
WM. CUNNINGHAM, Esq. of Bonnington,	<i>Respondent.</i>

House of Lords, 20th July 1804.

ENTAIL—FETTERS—RESOLUTIVE CLAUSE—SALES.—In the entail of the estate of Bonnington, there were perfect prohibitory and irritant clauses against the sale of the estate; but the resolute clause, which contained an enumeration of the acts which were to be deemed a contravention of the entail, did not mention sales;—held that the entail was not good to protect against the sale of the estate.

The question here was, whether the entail of Bonnington, in possession of the respondent, was sufficiently protected against sales of the estate? And whether the sales made by him of part of the estate to King and Gibson, in the belief that the entail did not validly protect against sales, were good and effectual? In an action raised by the respondent to have it found that the sales were effectual, the appellant was called as a party, being the next substitute after the death of the respondent and his two sisters, neither of whom had any issue.

The entail contained the following prohibitory clause, declaring that it should not be lawful “ to sell, annailzie, dispone, dilapidate or put away, the foresaid lands and estate, or any part or portion thereof, nor to innovate or infringe this tailzie and order of succession hereby made by me, nor to contract debts, nor do any other fact or

“ deed, civil or criminal, of omission or commission, whereby
 “ the said lands and estate may be any wise apprised, evicted,
 “ ed, or forfeited frae them, or any otherwise affected in
 “ prejudice or defraud of the subsequent heirs of tailzie
 “ and provision foresaid *successive*, according to the order
 “ and substitution above mentioned.” Then followed this
 irritant clause: “ Whilk hail debts and deeds so to be
 “ contracted, done, or omitted by them, in prejudice or defraud,
 “ as said is, are not only hereby declared void and
 “ null, *ipso facto*, be way of exception or reply, without any
 “ necessity of declarator to follow thereupon, in so far as
 “ the same may burden and affect the said estate.” Then
 follows the resolute clause, upon which the present question
 is raised; “ but also it is hereby provided and declared,
 “ that the said heirs of tailzie who shall contravene and incur
 “ the said clauses irritant, or any of them, either by not
 “ bearing, assuming, using, and carrying the said name and
 “ arms of *Cunningham*, or be the said heirs *female* not
 “ marrying a gentleman of the name, or who shall assume
 “ the name, and bear and carry the same surname and arms
 “ in manner respective forward, or who shall break or innovate
 “ the said tailzie, or contract debts, or commit any
 “ other fact or deed of omission or commission, whereby
 “ the said lands and estate may be evicted, or anywise affected
 “ in manner foresaid, that then, and in any of the
 “ said cases, the said persons so contravening shall forfeit,
 “ amit, and tyne their right and succession to foresaid lands
 “ and estate; and all infeftments, and pretended rights
 “ thereof, in their persons shall from thenceforth become
 “ extinct, void and null.”

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The respondent maintained, that though there were clear and sufficient fetters against selling in the prohibitory and irritant clauses, yet that the above resolute clause did not sufficiently protect against sales, and therefore that the entail was ineffectual against sales of the estate.

The appellant, on the other hand, contended that this was a sufficient resolute clause, resolving the right of the heir, on his committing “ any other fact or deed of *omission* or “ *commission*, whereby the said lands may be evicted, or “ *anywise affected in manner foresaid*.” That selling was just an act of “ *commission*,” and when this was taken in connection with “ *in manner foresaid*,” there is an immediate reference made to the clause immediately preceding,

1804. in which the prohibitions against selling, &c. are sufficiently distinct.

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Mar. 8, 1804. The Court, on report of Lord Craig, Ordinary, pronounced this interlocutor:—"Find that the dispositions libelled by the pursuer, are valid and effectual to the purchasers, "and decern and declare accordingly."

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant.—Admitting that entails are to be strictly interpreted, and that their restrictions are not to be extended by implication, yet being authorized by the act 1685, they ought to receive a fair interpretation. The words in the resolute clause of this entail are sufficient, upon such fair interpretation, to bar a sale of the estate; for though they have considerable similarity to the words of the resolute clause in the case of Tillicoultry, yet it is submitted, that the difference of expression which has been noticed, does fully justify a different result.

Ante p. 231.

Pleaded for the Respondent.—The limitations are not to be extended, by inference or implication, beyond what is contained in the entail itself; this is a rule universally admitted, in the construction of all entails, in the law of Scotland; it is even received in questions betwixt heirs of entail themselves, who are personally bound by every limitation the entailer may have thought fit to impose upon them, as the condition of their holding the estate. Much more where the limitations are directed against third parties, as in a prohibition to sell or contract debt; in order to render these effectual against third parties, it is absolutely necessary these limitations shall be accompanied by fit irritant and resolute clauses, in terms of the act 1685, c. 22; and unless this be done, the estate cannot be secured from sale, however express and clear the prohibitory clause may be. In the present case, the resolute clause omits to strike at or enumerate sales among the acts therein mentioned, which brings the present case precisely within that of Tillicoultry, where such an omission proved fatal to the entail, in terms of the decision of the Court of Session, affirmed in the House of Lords. The resolute clause is essentially in its nature an enumerating clause—which enumerates the several acts prohibited in the prohibitory clause, but does not include among these selling, which therefore invalidates the entail.

After hearing counsel, it was

Ordered and adjudged that the interlocutor be, and the same is hereby affirmed. 1805.

For Appellant, *Wm. Alexander, Arch. Cullen.*

For Respondent, *John Clerk, David Cathcart.*

GLOVER
v.
GLOVER, &c.

NOTE.—Unreported in the Court of Session.

WILLIAM GLOVER, Merchant, Leith, *Appellant ;*
JOHN GLOVER, Wright in Leith, and Wm. }
KEIR, Merchant there, Oversman. } *Respondents.*

House of Lords, 11th February 1805.

SUBMISSION—ARBITERS—POWERS TO PROROGATE—OVERSMAN.—

Disputes as to an accounting in a copartnership concern, were, after action was raised, submitted to arbitration. The submission conferred a power on the arbiters to prorogate the submission from time to time, and provision was made for an oversman in case of difference of opinion. They differed in opinion ; and the matters coming before the oversman, he prorogated the submission. There was no power conferred on him to do so by the submission. In a reduction of his decree, Held, that though the submission conferred no express power on the oversman to prorogate, yet that the powers of doing so, conferred on the arbiters, must be held as having devolved on him, when they differed in opinion.

The appellant, and the respondent, John Glover, were partners in business together, which was carried on in Leith as merchants and herring-curers there. On the dissolution of the concern in October 1799, the respondent, John Glover, brought an action of count and reckoning before the sheriff, to ascertain and recover a balance alleged to be due to him upon the books of the company.

The matters in dispute were, of this date, submitted to Nov. 14, 1799. the arbitration of two arbiters, with power, in case of difference, to appoint an oversman. The arbiters proceeded, by the aid of an accountant, to investigate the books and the affairs of the company, when, having differed in opinion, the other respondent was chosen oversman in terms of the submission. The oversman's first order was, of this date, to Oct. 27, 1800. prorogate the submission, in order to keep it from expiring, which it did in the lapse of the year. And, of the same date, he ordered the appellant to deliver up all books and

1805. papers, &c. within a specified time. Various procedure followed, apparently resorted to for the purpose of delay. A second prorogation of the submission by the oversman took place. Interim decrees were pronounced, when, at last, the whole was brought into the Court of Session on the part of the appellant by a bill of suspension, together with a reduction of the decrees, upon the ground that the whole procedure was null, because though the arbiters had conferred upon them a power to prorogate the submission, yet as no such power was conferred on the oversman to do so, the prorogation was inept, and the whole proceedings null and void.

Feb. 21, 1802. The Court, of this date, pronounced this interlocutor:—"Repel the reasons of reduction, assoilzie the defenders, and decern; find the pursuer (appellant) liable in expenses, and allow an account thereof to be given in."

Mar. 11, 1802. On further petition, the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—In this case, the arbiters to the submission had alone power to prorogate the submission; but no prorogation was executed by them. The oversman had no powers to prorogate. The prorogation therefore executed by him without such power, and without even being consented to by the arbiters, was ineffectual. In the case referred to by the respondent, there was an express power conferred on the oversman as well as the arbiters.

Pleaded for the Respondents.—Whatever powers are conferred by the submission on the arbiters, mutually chosen, are held to devolve on the oversman, where provision is made for an oversman to determine in case of difference of opinion. And therefore a clause, in such a submission, empowering these arbiters to prorogate from time to time, must be held to devolve on, and be transferred to the oversman. It was so decided in the case of *Macbride v. Representatives of Macrae*, 1st July 1748.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed, with £40 costs in each appeal.

For Appellant.—*Wm. Adam, John Clerk, Geo. Cranstoun.*

For Respondents.—*Wm. Alexander, Thos. W. Baird.*

NOTE.—Unreported in the Court of Session.

GILBERT HAMILTON, Merchant in Glasgow, for Himself and the Other Partners of the late Glasgow Glass-Work Company,		<i>Appellants;</i>	HAMILTON, &c. v. GEDDES.
JOHN GEDDES, formerly Manager of the said Glass Work,				Respondent.

House of Lords, 26th Feb. 1805.

COPARTNERSHIP—SHARE—REMUNERATION.—A partner in the Glasgow Glass and Bottle-Work Company had, by the written agreement of the company, a one-seventeenth share, and also £100 per annum, allowed him for the management of the concern. Subsequent to this agreement, separate and additional branches of business were undertaken, of which the management also devolved on him, with the approbation of the Company. On the dissolution of the concern, he claimed, in addition to the £100, a further emolument for the management of these concerns. Held him entitled to this.

The present question was an action raised by the appellant, for himself and the other partners of the Glasgow Glass-Work Company, against the respondent, as late manager of the Company, for payment of £650. 18s. 2d., due by him to the Company, conjoined with an action raised by the respondent (Mr. Geddes) against the appellant and Company, in which he claimed £911. 3s., as a balance alleged to be due to him as manager.

The facts appeared to be, that Mr. Geddes had been regularly bred to the art of glass making, and was engaged in the house of William Henderson and Co. of Glasgow, as superintendant of the preparation of glass for the manufacture of bottles, at a salary of £80. On the dissolution of that company in 1785, a new partnership was formed for continuing the manufacture of bottles, under the firm of the Glasgow Bottle-Work Company. In the arrangement of the new partnership, the respondent was retained as general manager of the manufactory, at a salary of £100 a year, with the benefit of a free house, coal, candles, and a thirteenth share of the profits of the concern. A short time thereafter, this Bottle-Work Company united with another Company, which then carried on the manufacture of Flint Glass at Verreville.

The contract in this new Company provided for the annual balancing of the books on 31st December of each year. It also provided,—“ That although, by the contract, the said John

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" Geddes is admitted a partner, and holds one-seventeenth share in this Company, yet it is expressly declared and understood to be under the conditions and restrictions more particularly specified in an agreement of this date, made and entered into between him and the Company, and to which all parties bind themselves to conform."

The agreement here referred to was in these terms:—

" 1. That the said John Geddes shall take the management and direction of the business of the Company, for which he shall be allowed the sum of £100 sterling yearly out of the Company's stock during his management, besides his one-seventeenth share of the profits or loss arising from the business, if any such be; as likewise the house usually occupied by the Company's manager, and coals and candles for his family. 2. In consideration of which, the said John Geddes shall devote his whole time and attention to the affairs and business of the Company, and keep such regular books and accounts as necessarily belong to the business of his department, and which shall be open to the inspection of the partners at all times. That he shall likewise *engage, or cause to be made, all the pots necessary for the business*; and, in short, *he hereby engages to do whatever else may be required of him for the interest and advantage of the Company*. 3. That it shall and may be competent, at all times, to and in favour of a majority of the partners of the said Company, in point of interest, in case of difference, at pleasure to supersede the said John Geddes as manager, and to appoint another in his stead, upon giving him six months previous notice, or in the Company's option, instantly to supersede him, upon paying him £200; and likewise, that the said John Geddes shall, at all times, have it in his power to leave the said Company's service on giving them six months previous notice, and, upon either event, he shall thereafter cease also to be a partner in the said Company."

It was stated by the respondent, that when he entered into this agreement, the Company retained, and had in their service, a potmaker or manufacturer of large crucibles, in which the glass is made, at a yearly salary of fifty guineas, with the benefit of a free house, coal, and candles, and had also a clerk at the yearly salary of £40.

Soon after entering on these engagements, the potmaker died, and, in the early infancy of the manufacture at that period, another artist was not easily to be found. Fortunately, the respondent had occasionally devoted a part of his

attention to this subordinate branch of the business, and, to prevent an interruption of the Company's operations, he instantly set himself to work in the pot-loft, and submitted himself to the drudgery of constructing large crucibles.

It was stated by the respondent that the above contract or agreement was not final as to ascertaining his emoluments as manager; and that, in point of fact, no agreement, written or verbal, was entered into to that effect; while, on the other hand, when the separate business carried on by the company at Verreville (managed by a separate manager with a salary of £100 per annum, and a clerk with a salary of £50) was transferred from Verreville to the Bottle-work, and carried on there, the manager of that business (flint glass) was dismissed, and both branches of manufacture were placed under the direction of the respondent. Further, after he had entered on the duties of this double management, it was resolved by the committee of management to employ the works at Verreville, which had been for some-time unoccupied, in a separate manufacture of bottles. This scheme was carried into execution early in the year 1787, and the superintendence of this third glass-house was also committed to him. It was, however, given up in the following year. But the other branches continued managed by him, together with the duties of pot-maker, until the dissolution of the concern in 1793.

In these circumstances, the present question arose, the respondent claiming, in addition to the £100 for management, as at the time agreed on, also emolument for the separate branches subsequently imposed on him, and undertaken and managed by him with the approbation of the company.

The defence to this claim was, that the respondent's salary, and other emoluments, had been limited by a positive and valid agreement. And, independently of this agreement, the reward which he thus received was fully adequate to the value of his services.

After various procedure, and a report from men acquainted with such business, the Court of Session finally pronounced this interlocutor:—"Find the said John Geddes July 11, 1800. " entitled to an allowance, including all his claims for salary, " extraordinary trouble, or for the expenses of entertain- " ments in his house, at the rate of £226. 18s. 5½d. sterling, " per annum, during six years and a half that he acted as " manager for the petitioners Gilbert Hamilton and others,

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1805. "and remit to the Lord Ordinary to proceed accordingly, to
 "hear parties on any claims of compensation, and all other
 HAMILTON, &c. "points of the cause, and to do therein as he shall see
 v. "just."
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 June 2, 1801. On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The salary of Mr. Geddes, as settled when the Glasgow Bottle Work and the Flint Glass Company were united into one copartnery by a contract bearing date 1st September 1785, which was to take effect in June 1786, was £100 per annum, besides a house, coal, and candles. That this was the salary settled between the parties, and actually received by the one and paid by the other, during the whole period of their connection, is established not only by the agreement, extended on stamped paper, and which is referred to in the contract of copartnership signed by Mr. Geddes, and the other partners, but is also established by the books of the company, kept by Mr. Geddes himself, or under his direction. The precise amount of salary, calculated for years, for months, and for days, in pounds, shillings and pence, appears stated in these books, in conformity to which the money was actually paid and received by Mr. Geddes. That no additional salary was ever stipulated for, follows from the written minutes of copartnery, where, though steps appear to have been taken for enabling Mr. Geddes to carry on the business with assistance, nothing is ever said about allowing him an additional salary or recompence for past trouble. Nor is there any writing whatever tending to establish that any additional salary was to be granted, or that it ever was stipulated for by Mr. Geddes.

Besides the salary of £100 a year, a house, and coal and candle, Mr. Geddes, the manager, had, as a partner, a share of the profits; and when the two Glass Work Companies were united in 1786, there was conferred upon him a greater proportion of those profits (his interest changed from a thirteenth to a seventeenth share) than upon the other partners. It is often the case, that partners of a company judge it most expedient to make the emoluments of their manager depend, not so much upon salary as upon the profits of their trade. By this means he is stimulated to be active, industrious, and attentive to the concerns of the company; for his interest is interwoven with that of the company, and

made to depend upon it; whereas, when managers have large salaries, they often become careless about the concerns of trading companies, and are indifferent whether their affairs prosper or not. To guard against this evil, the company made Mr. Geddes a partner, entitled to a share of the profits, and they increased his share in 1786 to a seventeenth share, in place of conferring upon him a large salary. If Mr. Geddes denies this to be the arrangement, then it lies on him to show the contrary, and to prove what positive and fixed sum was allowed. Because it is the duty of a partner to perform the business of his department in the concern without claim of any sort beyond his profits as a partner, and he ought to be content with his seventeenth share of the profits of the concern, unless he can show clearly that a further allowance was distinctly bargained for.

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Pleaded for the Respondent.—The recompence due by the Glasgow Glass Work Company to the respondent as their manager, had not been limited and ascertained by any previous and binding agreement. And, in the deficiency of a positive agreement, the recompence due to the respondent belonged to be ascertained by the nature, and proportioned to the extent of his services, according to the just and ordinary rate of recompence in similar cases. The justice of the claim, and the mode of adjusting it on the part of the Court of Session, by reference to the judgment and opinion of men of experience in the trade and in such matters, whose report and award it could rely upon, was unexceptionable, and the sum awarded by them fair and moderate, in the circumstances.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For the Appellants, *Wm. Adam, Wm. Alexander, Ar. Campbell.*

For the Respondent, *Samuel Romilly, Thos. Thomson.*

NOTE.—Unreported in the Court of Session.

1805.

[Hume's Decisions, p. 130.]

BANNERMAN

v.

BANNERMAN,
&c.

DAVID BANNERMAN of Letham Hill,

*Appellant ;*AGNES BANNERMAN, Wife of James M'Kinlay,
Manufacturer in Glasgow, and the said
JAMES M'KINLAY for his interest, and Wm.
and ELIZABETH BANNERMAN, and DAVID
SPOTTISWOODE, their Curator *ad litem*,*Respondents.*

House of Lords, 1st March 1805.

CONTRACT OF MARRIAGE — COLLATION — SUCCESSION AB INTESTATO.—A father having children by a first wife deceased, entered into an antenuptial contract of marriage with his second wife, by which, in the event of his dying intestate, he conveyed all his heritable and moveable estate, share and share alike, among the children, both of that and his former marriage. Many years after this, he executed a disposition of certain heritable subjects in favour of his daughter Agnes, by his first marriage, and her husband. After the father's death, her brother claimed the whole heritable estate, and she claimed her share of the whole heritable and moveable estate. Held that the children of both marriages were entitled to equal shares of the whole, and that the daughter was bound to collate the heritable subject disposed to her, and the other children were bound to collate whatever sum or subject they had received. In the House of Lords, this judgment was in part remitted and part affirmed ; the part remitted having reference to collation, the Lord Chancellor doubting whether this could be considered as an *ab intestato* succession, to which alone collation could apply.

The deceased David Bannerman of Letham Hill was twice married. With his first wife he had two children, the appellant, David Bannerman, and Agnes Bannerman, one of the respondents. No contract or deed of settlement was entered into with reference to this marriage, or the issue of it.

In entering into his *second* marriage with Jean Finlay, an antenuptial contract was executed, whereby he made over to his intended spouse, in case she should survive him, one-third of the whole household furniture and plenishing, including heirship moveables, that should belong to him at his death: And also bound himself, his heirs, &c., to pay her an annuity of £15 per annum, this to be restricted to £10 per annum, "in case of and during the existence of a child or children of the said marriage, or their issue." Declaring that the said pro-

“visions to the said Jean Finlay to be in full of all terce of lands, half or third of moveables and other legal provisions whatsoever.” “Moreover, it is further declared, that in case the said David Bannerman shall die intestate, and without leaving any written settlement of his affairs, then, and in that case, the child or children procreated of this marriage (if any be) shall succeed and have right to, as in that event he hereby dispones, assigns, and makes over to them, and each of them, an equal share and proportion, along with his other children by his former marriage, and by any future marriage which he may hereafter contract, *secundum capita* of the whole sums, debts, effects, and subjects, heritable and moveable, which shall be belonging and owing to him at his decease; but declaring, that as the provisions and conveyance in favour of the children of this marriage, above written, is intended to take place only in the event of the said David Bannerman his dying without making a settlement; so he, the said David Bannerman, shall have the full and unlimited use and disposal of his said sums, debts, effects, and subjects, during his life, and to settle and destinate the same by deeds, to take effect at and after his death, in such manner as he shall think fit.”

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Of this second marriage he had issue, the other respondents, William and Elizabeth Bannerman.

David Bannerman died in the year 1799, without leaving any written settlement of his affairs; but, sometime previous to his death, and twenty-one years after the date of the above contract, he executed a disposition, conveying to James M'Kinlay, spouse of his daughter Agnes Bannerman, certain heritable subjects, under burden of certain specified provisions, to the said Agnes Bannerman, his said daughter, and her children. This disposition proceeded on the narrative, “that no provision has hitherto been made by me to my said daughter, which it is just and reasonable I should now do.”

After his death, his widow was confirmed *qua relict*, under which title she intromitted with the whole moveable estate, while the appellant, as heir of his father, took possession of his heritable estate, and had, it was said, received large sums from the father during his life.

Agnes Bannerman or M'Kinlay raised the present action of declarator and payment, to have it found, that by the terms of the above contract of marriage, she was entitled to the one-fourth of all her father's estate, both heritable and move-

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&c. able, and concluded for payment of "one-fourth share of
" the said heritable property, in terms of, and conform to the
" foresaid contract of marriage," she being willing to allow
£600, being the value of the subjects disposed by her said
father to her by the foresaid disposition. Another action
was raised by William and Elizabeth Bannerman, on the
same grounds, and claiming that their shares be paid equal
to a fourth part of the whole, if Agnes Bannerman were in-
cluded in the division, or to two-thirds, if she were held to
be excluded. These two actions were conjoined.

It was maintained by the appellant, 1. That Agnes Ban-
nerman had no right whatever, under the contract of the
second marriage, and she was farther barred by special
provision. 2. That the children of the second marriage
having intromitted with the whole moveable effects, had
already drawn their share of it; and that they could now
only claim so much of the heritable property as would be
sufficient to make up to each of them one-fourth of the
whole; and, 3d, That as his right of succession was as heir
at law, and not under any particular deed, he was entitled
to the whole heritable property, less that part of it which
shall be sufficient to make up to William and Elizabeth their
fourth share under the marriage contract, and has no inten-
tion of collating, and is not bound to collate, the heritable
property, he not wishing to participate in the moveable.

June 14, 1800. The Lord Ordinary found, "that the whole subjects, heri-
table and moveable, which belonged to the deceased David
Bannerman, will fall to be divided into four equal portions,
between the pursuers and defender in these conjoined ac-
tions; each being bound to give allowance for, or throw
into *cumulo* to be divided, such sums or subjects, or the
value thereof, as either of them may have received from

Nov. 18, 1800. "their father during his lifetime." On representation, his
Lordship adhered. And, on reclaiming petition, the Court
July 2, 1801. adhered.

A petition for sequestration of the rents being at this stage
July 4, 1801. presented, the Lord Ordinary sequestrated the same, and
appointed a party receiver. A representation was presented
July 9, 1800. against this interlocutor, but refused: And, on reclaiming pe-
tition to the whole Court, this interlocutor was adhered to. The
appellant then reclaimed against the interlocutor of 2d July.
Dec. 15, 1801. Whereupon the Court adhered, "reserving to the petitioner
" to be heard with respect to the claim made against him of
" collating any sums received by him from his father, and

“remitted to the Lord Ordinary to proceed accordingly, “and do therein as he should see cause.” By two interlocutors he was appointed to condescend and specify all sums received from his father since he became forisfamiliated.

Against these interlocutors the present appeal was brought.

Pleaded by the Appellant.—The contract of marriage contains merely a settlement of a jointure on the second wife, Jean Finlay, and of certain provisions on his children, to be procreated of his second marriage, in case he should die intestate, and without leaving any written settlement of his affairs; and it was by no means intended by it to secure any provision to the children of the first marriage; but their succession remains to be settled as between themselves by the rules of law *ab intestato*. And this construction of the disputed clause in the contract is strengthened by the disposition executed in favour of the husband of the respondent Agnes, which proceeds on the narrative of no provision having hitherto been made for her. The appellant therefore is not bound to collate the heritage to which he has succeeded, as heir at law *ab intestato*. Agnes can claim nothing under the contract of marriage, and even if she could, all right would be excluded by the disposition in her favour, which expressly bears to be a provision to her. In regard to William and Elizabeth, the appellant admits that they are entitled to the half of the whole succession left by their father. As they are, however, expressly entitled to part of the moveable succession, or to the whole, if Agnes Bannerman does not choose to collate the separate provision made for her, the appellant insists only that, in taking their share of the real estate, these respondents shall give him deduction for the value of the personal estate to which by law they are entitled.

Pleaded for the Respondents, Agnes Bannerman and Husband.—By the contract of marriage in question, the whole property, heritable and moveable, was conveyed to his children of the first, as well as of the second marriage, in equal shares, in case the granter should die intestate, and without leaving any written settlement of his affairs. Such is the import and construction of the contract, and such being the event that has actually taken place, the respondents are entitled to their share of that succession accordingly. Nor is this right of the respondents to a share of their father's estate, heritable and moveable, in the least affected by the disposition in favour of James M'Kinlay, as the last

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deed contained no revocation of the contract, nor any condition that the respondents should, by acceptance of the right contained in the disposition, discharge their claim under the contract, either in whole or in part.

Pleaded for the Respondents, William and Elizabeth Bannerman.—It seems admitted by the appellant that the respondents are entitled to one half, but then it is stated, that as they intromitted with the whole moveables, they have been paid their share; but this is a mistake. They have not intromitted with the deceased's moveable estate. It is the widow who has done so, and who has raised a multiplepoinding to have these distributed into four shares, according to the contract of marriage. And, therefore, the nature of the contract of marriage being to divide the whole property, heritable and moveable, belonging to the deceased, between the children of the first and second marriage, the appellant is bound to collate the heritage with them. Mr. Erskine says, Inst. B. 3, tit. 9, § 24, that "every provision given by the father to the child falls under collation," but here there is no provision given to the respondents, and, therefore, in every view, the appellant is bound to collate, not only those sums advanced to him by the father during his life, but also the heritage. Collation is not confined to the heir, but pleadable by all children, according to the tenor of the decisions. In these circumstances, and seeing that the appellant intended to repudiate his father's contract of marriage, which disposed of his whole property, heritable and moveable, among the children of the first and second marriages, and had taken exclusive possession of the heritage, the sequestration was a warranted step.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,

"I rise to move that judgment in this case be delayed till tomorrow, as I wish to reserve for so long the consideration of one point in it, which is that regarding the collation by the children, of those goods which they received from their father during his lifetime.

"This point deserves mature consideration. 1. As the doctrine of collation in Scotland seems to differ from that which is held in England. 2. From the peculiar rights which an heir at law in Scotland possesses; and, 3. From the peculiarity of the legal claims of younger children in Scotland.

"Persons of very high authority in the Court below have differed on the effects of the contract of marriage. Of the learned judges,

nine were of the opinion expressed in the interlocutors appealed from. In the minority, however, there were great authorities also. 1803.

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“ The question I shall have to propose to your Lordships will be, Whether you see sufficient reason, in all the circumstances of this case, and particularly in the text of the contract, on which the question arises, to reverse the interlocutor pronounced by the Court of Session or not. I confess that my own individual opinion is, that the majority of the Court is in the right.

“ The question at issue depends on the following circumstances.—(Here his Lordship stated the circumstances of the case). That in contracting a second marriage, he should have thought of providing for the children of his first marriage, I do not at all wonder at. There is no doubt that in England, the alteration of the father's situation, by entering into a second marriage, would be held as a sufficient consideration for provisions granted by him to the children of the first marriage. He not only in this contract provides for them, but also, as if he fully had in view the contingency of surviving his then intended wife, he, like a most provident man, provides for the children of any subsequent marriage ; but still the engagement he enters into is not very great—for all that his engagement extends to is, to provide that his property should be divided in a certain manner, different from that prescribed by common law in case he shall die intestate. It is in these words,—(Here the Lord Chancellor read the paragraph in the contract, beginning, “ Moreover, it is hereby provided and declared, that in case the said D. Bannerman shall die intestate,” &c.) It is true, that the main object of this clause was a provision to the children of the second marriage. In England, it would be held that the object is principally a provision for the children of the second marriage, yet provision is also intended to be made for the children of the former marriage ; as what the children of the second marriage are to have, is to be taken and construed from what the other children are to have. This settlement in England would have no efficacy, unless it were effectual for a provision to the children of the first marriage.

“ In England, the contract would be construed thus :—The provisions I choose to make are, that my property shall go equally among all my children *per capita*, unless I should hereafter, from the misconduct of any of them, or any other cause, think fit to dispose of my property otherwise. It must, of necessity, be construed thus.

“ An argument has been used by the appellant's counsel on the effect of the word *dispone*. Suppose the words of the contract ran thus :—“ I hereby *dispone* to my son and my daughter an equal “ share and proportion, along with the children of any other marriage,” &c. Here, upon the same grounds, it might be said, that the children of a second marriage had no right to any thing. But my answer would be, that there was a consideration given for their

1805. share, and they would be entitled to it: and the converse of this case is what Agnes Bannerman contends for.

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&c. “ This case might occur. D. Bannerman might have had two children of his first marriage, but one of the second, and twenty of a third, then, according to the appellant’s argument, if the father left nothing but heritable property, the single child of the second marriage, in order to ascertain its share of the father’s property, must enumerate all his children, and would find that it was entitled only to a twenty-third share, but the younger child of the first marriage, and the twenty children of the third marriage would be entitled to nothing, and the heir would have the remaining twenty-two shares all to himself.

“ On the point of the sequestration, I think we may very safely trust the Lords of Session, as it is a matter of regulation in which they are perfectly competent to decide.

“ In the matter of collation there is more difficulty. It is to be considered with reference to a contract which has made a disposition, in case intestacy takes place.

“ As the party expressly reserved the power of disposing of his property to his children as he thought fit and proper, and the contract was only to operate on what he left at his death, the question here seems to be, Whether, what he gave in his lifetime should by collation be rendered null? There seems in this case little difference between Agnes and the heir at law. Here the question is, not what Agnes as a younger child, or D. Bannerman as heir at law, are obliged to do; but it is, Can the parties, under this contract of marriage, resist that species of collation which might be claimed in another case, supposing them to have stood in their legal character?

“ This part of the cause comes here in a whimsical state. The course which it took was this:—Lord Hermand, on 14th June 1800, decided for the collation by all parties of what they had received from the father during his lifetime. On 2nd July 1801, the Court of Session found that the Lord Ordinary had done right. On being applied to to review this opinion, the Court, instead of deciding whether the Lord Ordinary was in the right, they desired the appellant to go to ask the Lord Ordinary himself to review his own judgment. And, on 18th December 1801, the Lord Ordinary adheres to his former opinion.

“ It would be of essential benefit to this House to know the opinion of the Court of Session upon the collation, where it is applicable, and where it is not. I feel very unwilling to put the parties to the great expense which would arise in sending back this part of the cause to the Court of Session, and yet have a delicacy to decide the point. In the first instance, however, if that is to be done, I do not think I should be right in forming a hasty opinion upon it, and therefore think it proper to propose that judgment in this cause should be postponed till to-morrow.

"The Lord Chancellor then moved that this cause be further proceeded in to-morrow, which was ordered.

"Adjourned."

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Case resumed, 26th February 1805.

THE LORD CHANCELLOR said,—

"My Lords,

"This point was debated yesterday. One point only remains upon which I have alone difficulty, namely, that of collation, arising out of the Lord Ordinary's interlocutor of 14th June 1800. His Lordship then appointed "each of the parties to give allowance for, "or bring into the *cumulo* to be divided, such sums or subjects, or "the value thereof, as either of them might have received from their "father during his lifetime."

Agnes, one of the respondents, had been advanced by her father in his lifetime, as she admitted, to the extent of £800. This advancement she offered to collate with the other parties; making, as a condition of this offer, that the defender also was bound to collate what he had received from his father.

This point comes before us rather in singular circumstances. From the opinion of the Lord Ordinary, a proceeding in the nature of an appeal was taken to the whole Judges, and their Lordships, on the 2nd of July 1801, adhered to the interlocutor of the Lord Ordinary in *omnibus*. But, on a second reclaiming petition, the Court, on the 15th December 1801, remitted to the Lord Ordinary the further consideration of this point of the collation. The Lord Ordinary accordingly directed the defender to give in a condescendence upon this subject; but, instead of doing so, the defender brought his appeal to your Lordships, so that this point comes before us without being distinctly decided upon by the Court.

"The principal question in this cause was, Whether the distribution of the property of the father was to take place by force of the contract entered into on the second marriage, which was only to take effect in case of his intestacy? To this the matter of collation was incidental. Collation is rather considered a privilege of, than an obligation upon, the heir; and my difficulty is, if collation can obtain in a case where intestacy does not operate. The distribution here was regulated by the contract of marriage, which, if it was to operate at all, was to operate upon the property remaining in the person of the father at his death.

"He had reserved a power to dispose of the property, and give it to the children in his lifetime. If collation was necessary, this power of disposing in his lifetime was right. It is said, therefore, that the law of collation does not here apply.

"I am aware that Agnes made an offer to collate; but it was upon the view that the appellant was bound also to collate; and I wish to have this taken care of in the judgment of this House, that this offer should not be taken as absolutely binding, but upon the condition of the appellant so collating also.

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"I shall therefore beg permission to adjourn this matter till Thursday, that I may have time to draw out what I think the judgment of your Lordships in this case ought to be."

On Thursday, his Lordship read the following judgment:—

Ordered and adjudged that the appeal be dismissed, in so far as the same relates to the interlocutors of the 18th December 1801 and 16th January 1802, but with liberty to the appellant, David Bannerman, to apply to the Court of Session, as he may be advised, touching the same; And it is hereby declared, that in case any proceedings be had in consequence of such liberty, it shall be found that the claim made against the said appellant of collating the sums and value of property which he received from his father in his lifetime, cannot be sustained in law, that the pursuer, Agnes Bannerman, is not, in that case, to be held bound by any of the proceedings hitherto had in any of these matters, or by any offer heretofore made on her part to collate, in respect of the provision appearing by the proceedings to have been made by her father by the disposition of the 29th April 1799: And it is hereby ordered that the cause be remitted back to the said Court of Session* to consider whether, if the appellant, David Bannerman, in this case, cannot be required by law to collate, the said pursuer, Agnes Bannerman, ought to be held as being by law, in this case, bound to collate; and it is further ordered and adjudged, that the said several interlocutors complained of in the said appeal in all other respects be, and the same are hereby affirmed, in so far as the same are not inconsistent with the directions hereby given.

For Appellant, *Wm. Adam, John Dickson.*

For Respondents, (Agnes Bannerman), *Samuel Romilly.*

For other Respondents, *Wm. Alexander, Thos. W. Baird.*

NOTE.—In the report of the case by Baron Hume, the point of collation seems not to have been sufficiently adverted to. It was the chief point discussed in the House of Lords—and, in as far as the appellant is concerned, must be taken to refer to those "sums and "value of property" received by him during his father's lifetime, and not to the heritage succeeded to at his death, which, of course, fell under that part of the interlocutor affirmed.

* What was done under this remit does not appear.

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<p>WM. DALGLEISH of Scotsraig, Esq., and MESSRS. LITTLES & Co., WM. SIMPSON, GEORGE SIMPSON, and JAMES MARTIN his Lessees,</p>	}	<p><i>Respondents.</i></p>	

House of Lords, 21st March 1805.

SALMON FISHING—STAKE NETS—RES JUDICATA—INTERDICT.—

Question whether a new mode of fishing, by means of stake nets, was illegal, these being placed far below where the river Tay widens into an estuary, frith, or sea? On bill of suspension and interdict, the interdict was recalled, but bill passed to try the question, and held that the case of Hunter of Seaside was neither *res judicata* nor conclusive on the general question. Affirmed in the House of Lords.

This case was somewhat similar in its nature to Hunter of Seaside's case, (vide ante p. 561), with a difference in the situation where the stake nets were used, these being placed farther down the Tay, and on fishing grounds belonging to the respondent Mr. Dalgleish. The Honourable William Maule of Panmure was also proprietor of fishings on the Tay, so far down in the open sea as to be near Broughty Castle, and another in the Bay of Monyfeith, also on the banks of the Tay, near its junction with the sea, which were let to George Gray of Carse, his lessee. Their respective lessees had erected the stake nets where the river widens into the frith, and joins the ocean. Bills of suspension and interdict having been brought against them separately by the appellants, the actions went on separately in the Court of Session.

In both cases, it was alleged that their cases were different from Mr. Hunter's case, arising from the situation of the fishing grounds. The respondents maintaining that Hunter's fishing grounds were several miles *above theirs*, nearer, or in and upon the river, while their fishing, and engines for the same, were upon the shore of the main sea, far below where the Tay could with propriety be called a river, or even a

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frith ; and as the acts of parliament did not apply to such situations, places, or estuaries, and indeed did not prohibit stake nets in such situations, but only prohibited cruives and yairs within rivers, their mode of fishing was perfectly legal and unexceptionable. In answer, it was maintained that the case of Hunter of Seaside must decide the present question. That the facts were the same, and as the parties were almost the same, for the Messrs. Littles were respondents in that appeal, it was to be held as a *res judicata*. To this it was replied, that as the parties were different, and the nature of the rights and situation of the fishings different, and as the case of Hunter did not settle the general point, that decision could neither be binding as an authority, nor bar as a *res judicata* the present actions. Separately, it was also contended by the respondents that Mr. Hunter's grant was different from Mr. Dalgleish's. Mr. Hunter had right to the lands of Seaside and Auchmuir, "with the fishing of salmon and other fishes, in the Water of Tay, opposite to the lands of Auchmuir." Mr. Dalgleish's grant ran thus: "The lands of Carpit, with the fisheries of salmon and other fisheries, and whole pertainments of the same," and "the lands of Causeyhead, and salmon fishings belonging to the said lands called Greenside."

The grant of Mr. Maule, (respondent in the other appeal), was, "Totas et integras terras de Eagles Monichto Balmossie, cum duobus molendinis de Brachan, et terras binæ partis de Kirkton de Monifieth et Justingleys, cum omnibus piscariis in mari et fluvio de Tay, juxta terras de Monifieth et Justingleys et Eagles Monichto a rapis et littoribus earund. cum omnibus partibus* marinis infra easdem, cum privilegiis maris et fluvii de Tay intra et erga præfatas terras et earundem pertinentiis."† He therefore maintained that there was a grant of fishing in the sea, and also in *fluvio de Tay*. His charter gave a right of fishing *in mari*, and also in *fluvio de Tay*, that is, in the river, and he contended that his fishings at Broughty Castle were in the sea, and therefore not within the provisions of the statutes.

June 13, 1804. The Lord Ordinary pronounced this interlocutor, "Having again considered this bill with the answers, writs produced, and memorials, and having advised with the

* In the respondent Gray's case this is "*portubus*."

† In the respondent's case this is "*pertinentias*."

"Lords, recalls the interdict, but passes the bill upon the caution lodged, to the effect of trying the question."*

A like decision was come to at same time, in the interdict brought against the Honourable William Maule, and his lessee Mr. Gray.

Against this interlocutor, *in so far as it recalled the interdict*, the appellants brought an appeal to the House of Lords upon that point.

Pleaded for the Appellants.—By the decision of the late case respecting the fishery belonging to Mr. Hunter of Seaside, two points seemed to be settled as firmly as the most solemn and deliberate decree of the supreme court of Scotland, affirmed in the last resort, can settle any point of general law: First, That the sort of machinery called stake nets, introduced by Mr. Hunter and his lessees, and which the respondents in the present cause continue, notwithstanding that decision, to use, are prohibited by the *statutes in certain situations*, being truly a species of yair-dam, and of most destructive nature. Secondly, That situations similar to that in which Mr. Hunter's nets were placed are

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* Opinions of the Judges:—

LORD PRESIDENT CAMPBELL said,—“These are sea fishings in the frith of Tay, and the question as to them is not the same which was determined, in the case of the river fishings, with Hunter of Seaside; at least, the parties must have an opportunity of being heard. In the meantime, no interdict ought to have been granted in the Bill Chamber, especially *ex parte mandata*.

“This is not the case of a possessory judgment, for there is no competition of rights here, but merely a question as to the mode of exercising a right; and the party who is in the actual possession of a certain subject, cannot be summarily turned out, till it be known whether he is rightly or wrongfully in possession. Any possession is better than none, and must be presumed to be lawful till the contrary be proved. An interdict never should be granted *ex parte*, unless in cases of imminent danger. Some regulation ought to be made about this by act of Sederunt, requiring a certain intimation to be given before the demand is made.”

LORD HERMAND.—“I am for removing the interdict.”

LORD CRAIG.—“I am for doing the same. I refused it on the former occasion.”

LORD WOODHOUSELEE.—“I am of the same opinion.”

LORD MEADOWBANK.—“I doubt whether the *res* are not concluded by the former decision.”

LORD BALMUTO.—“I am for removing the interdict.”

Lord President Campbell's Session Papers, vol. 114.

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within the description and intendment of the statutes. The first of these propositions seems now to be conceded on all hands ; the second cannot be conceded by the respondents, and the other persons with whom the appellants are now unexpectedly contending, without pronouncing their own condemnation. They insinuate, though they do not broadly say, that the decision in Hunter's case was erroneous ; and they speak out their intention of having the question tried again, as, though it undoubtedly binds him, it does not bind them, nor can be pleaded by the appellants as a *res judicata*, since they were not parties. How far it was decent or justifiable to oblige the appellants to go over the same ground again, when the case decided was universally considered as a leading one ; and, where there is no solid distinction, it will be for the Court of Session, and perhaps for your Lordships, to say, when the actions which the appellants have been compelled to institute come to be heard on the merits. The machinery at Seaside was placed at a great distance from the ordinary bed or channel of the river Tay, upon lands only covered with water when the tide flows, and entirely dry when it ebbs ; Mr. Hunter asserted, and offered to prove, that the water which covered the sands was at all times salt, but the Court of Session and your Lordships refused to let him into such evidence, considering *that* circumstance to be of no importance ; in truth, the only distinction between Mr. Hunter's case and that of the persons who are now disputing the point, is, that their fisheries are farther down, some of them more and some of them less distant from what is termed the open sea ; some of them, as will be seen from the plan, are on the southern bank, nearly opposite to Seaside. The nearer the Tay approaches to the ocean, it has of course less the appearance of a river at low water, and this is gravely contended as distinguishing the inferior fisheries from that at Seaside, though there the space covered by the water is upwards of two miles in breadth, and has all the features of an arm of the sea at high water, as much as where the stake fisheries in question have lately been erected. The case now particularly under consideration has been singled out to take the lead, as being the fishery farthest down, and because, if it is to be decided in the appellants' favour, it is to be presumed that all the others must submit, though it does not follow that it will decide all the rest, if given against the appellants, because there are circumstances alleged to distinguish ¹ from the Seaside fishery, whereas in some others there is

not a colour of distinction. They must be prohibited, unless the principle of the decision in the Seaside case is to be completely overturned. The respondents are perfectly sensible of this, and therefore dispute the principle. According to them, the acts of parliament regarding salmon fishings, had relation only to that part of the river where the water is fresh, and the stream generally perceptible, though it is influenced by the tide, just as the Thames is at London Bridge; lower down, (as for example, at Gravesend), the water being brackish, they say, it was not the intention of the legislature to impose the prohibition. But the acts regulating the fishings in Scotland do not countenance such a latitude of construction.

Pleaded for the Respondents.—The judgment of the Court of Session, affirmed in the House of Lords, in the action brought by the appellants against Mr. Hunter of Seaside and his lessees, on which, demand of an immediate interdict against the respondents has been founded, affords no precedent or authority for determining either the lawfulness of the mode of salmon fishing employed by the respondents, in the situation in question, or of the title and interests of the appellants to challenge his operations. In the case of Seaside, no general or abstract point of law was decided; it was merely adjudged, that under the grant from the crown, by which the defender had acquired a right of salmon fishing, and in that particular local situation to which his grant related, the pursuers had a right and interest to prevent the use of that kind of fishing-apparatus used by Mr. Hunter and his lessees. But unless it could be shown that, in these respects, the case of Seaside and the present case were similar, or identical, the decision given in the former would give no sufficient ground for a similar decision in the latter; and still less would it warrant a court of law in granting an immediate interdict before the question of right had been regularly tried. But, in point of fact, the grant under which the fishings in question have been conveyed by the crown, is in its terms essentially different from that to Mr. Hunter; and, in local situation, a difference still more essential has been pointed out. The acts of parliament do not apply to waters such as the Tay where it joins the sea, but to rivers only, and prohibits cruives and yairs in those rivers, unless there be a grant from the crown of such fishings; but they do not refer to stake nets erected on the sands at the mouth of the river. Here the fishings by stake nets are situated, not in the river, but on the coast

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of the German ocean, with the exception, perhaps, of one which is situated westward of Broughty Castle.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,

My Lords,

“The motion which the forms of this House render necessary for me to put to your Lordships is this, that the judgment in this cause should be reversed;* but it is impossible for me here to reconcile my mind to such a conclusion.

“The present are appeals from unanimous judgments of the Court below. But the Court had not gone the length of considering the merits in these cases, nor are such merits before your Lordships. The nature of the proceeding is, that the pursuers in the proceedings in the Court below have undertaken to prove, *hereafter*, that the mode of fishing adopted by the respondents was injurious to their private and individual interests; but the nature of their request is, that before they prove their case, the Court shall abate the respondents’ fishings, though this at the risk of depriving them of their legal rights.

“This also was a unanimous decision, in a case where the Court had under their immediate consideration what had been done by themselves in regard to the fishings of Mr. Hunter of Seaside, and what your Lordships had done in that case, after much doubt and difficulty felt thereon, and also what the Court had themselves done in the case of Lord Kinnaid’s fishings.

“It was not only the act of a Court thus instructed, but (as what they have done, in so far as they have judged the matter, is to pass the bill to try the question, recalling the interdict, in order to keep things entire pending discussion), it also depended much upon a point of practice, which must be best known to that Court; even in a case of practice, your Lordships may reverse the judgment; but in doing so, you proceed with great caution, and not till you ascertain that the judgment is wrong.

Duke of
 Atholl.

“We have just received from a noble Duke all the information which an able and distinguished peer, acquainted with the local circumstances of the case, can give us; and the question for us to decide is, are we prepared to say that the unanimous judgment, in the case which I have stated, is wrong?

“The nature of the action is an action at the suit of private individuals, not stating a public abuse as the ground of action, but to secure their own private interests. It would, in my opinion, be not

* In allusion to the form then observed in the House of Lords, of stating no reasons when a judgment was to be affirmed. When it was necessary to state reasons in such a case, a motion was usually made to reverse, and the Chancellor spoke in the negative of that motion. Now, however, the practice is different. The motion is always a motion to reverse, which the appeal itself necessarily raises.

a little singular were your Lordships to grant an interdict in this case against this unanimous judgment, and where it was admitted to us at the bar, that an analogous judgment in injunction in this country not only could not have been granted, but could not have been asked for.

"If a quite new invention was for the first time put in practice, and likely to destroy or to do irreparable mischief to the ancient property of another, the Court would say, you shall not take the judgment into your own hands, but that the matter shall be put in a course of trial, and will grant an injunction. But if a judgment were given against such invention in one case, and this judgment were used in another case, where there were different parties, it could not be used as a precedent in point of fact, but a precedent in point of law.

"The law says, that it is a most monstrous proposition that the rights of other individuals are to be decided in a case where they were no parties. The question, therefore, is open. Besides, the case of Mr. Hunter of Seaside, which the appellants found upon here as conclusive against the respondents, was one much doubted about. A noble and learned Lord, now no more, had great doubts with regard to it. Indeed, I know no individual who had not some doubts with regard to it. It does therefore appear to me strange to argue that that case of Mr. Hunter should conclude the present cases, and to the effect of granting interdict in these.

"As to patent rights, the law of the Court of Chancery, founded on the practice of ages is this, that if a man gets a patent, and lays out his funds in putting it into effect, the Court will grant an injunction against any infringement of his patent right, because such infringement may do the patentee irreparable injury; but he must come forward promptly to try the right if he is to have an injunction. No person ever said in this country, give me for my old possession an injunction against your possession of two or three years standing. The law says, you should have come in time to have entitled you to this remedy.

"The case of Hunter of Seaside concludes no such thing as that there should be an interdict in the present case, nor does what the Court have done in Lord Kinnaird's case,* conclude it. The case

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* This case is not reported; but it appears, that after the recall of the interdict in this case, Messrs. Little took a lease of fishings immediately adjoining to Mr. Hunter's, from Lord Kinnaird, and there proceeded to erect the same machinery, imagining that their case would be dealt with in the same favourable manner. But, on application to the Court for interdict, the Court (13th Feb. 1805) passed the bill, and granted the interdict, holding, that there was a difference between this and Mr. Maule and Mr. Dalgleish's cases, Lord Kinnaird never having had possession, until very recently assumed, and the situation of the fishings being the same as in Hunter of Seaside's case. *Vide* Lord President Campbell's Session Papers, (January, February, March, 1805.)

1805.
 ———
 EARL OF
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 &c.

of Hunter decides only that the species of fishing then objected to was illegal in that place. My notion of an interdict is, that an individual is not obliged to take notice of what is done in another case; the appellants, if they conceived themselves injured, should have promptly come into Court for an abatement of the alleged nuisances before the trial of the other case.

"It was urged that the stake nets were of small value, and therefore interdict might be granted; but this is not the whole case. To carry on the respondents' fishings, they might have a large establishment on the spot and elsewhere. If they were to be abated now, and if they could afterwards show that they ought not to have been abated, the injury to these might be immense.

"Can it be said that the hardships on the other side are such as cannot be endured? A proprietor of a fishing higher up the river has a right to complain of impediments below if they are prejudicial to him. But the interest of the public is not at present before us, nor have the appellants any thing here to say on behalf of the public. If any person comes before the Court of Session pleading on the public behalf, that sort of case may have a different aspect.

"In a case like the present, especial regard is to be paid to the charters. The slightest and most ambiguous words, joined to usage, may have great effect. The public may perhaps be as much benefited as prejudiced by these nuisances.

"On these grounds I subsumed to your Lordships, that it would be a very strong proceeding to reverse the judgment in this case.

"As to the case of the interdict granted in Lord Kinnauld's fishings, I cannot reason against the respondents on that case. It proves to me that the Court of Session, in that and in this case, saw that it was proper to discriminate between cases which were identically the same, and those which were not the same."

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *Wm. Adam, R. Craigie.*

For Respondents, *Sir Samuel Romilly, M. Nolan, Thos. Thomson.*

NOTE.—An appeal was also brought by the same appellants, in the case with the Honourable William Maule of Panmure, and Charles Gray of Carse. It was disposed of at same time, and also affirmed, the Lord Chancellor's speech, as above given, having reference to both appeals. Both these cases are unreported in the Court of Session Reports.

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derstanding that he would invest the same on land, and also such shares, the dividends on which should appear, notwithstanding the transfer, to have been received by the father, ought to be considered as subject to the pursuer's claim of legitim, and therefore to have belonged to the father at his death.—*Lashley, &c. v. Hog*, 10th and 12th July 1804, p. 580. See Trust.

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—(2.) A person having become bankrupt, entered into a contract with his creditors, whereby they agreed to withdraw the sequestration, upon condition of his paying 12s. 6d. in the pound, proposed by him in a former arrangement with his creditors, he paying all debts contracted since that date in full. This was agreed to. He applied for his discharge without having paid the respondent's claim in full. In an action against his cautioners, held that this was not a contract preferring one creditor to another, and so not struck at by the act 33 Geo. III. c. 74, § 49.—*Arrot v. Ker, &c.*, 17th July 1804, p. 648.

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market of the House of Muir. The fleshers of Edinburgh were in use to resort to that market and bought the cattle, which they brought into Edinburgh for the purpose of slaughter and consumption. As buyers at the House of Muir, the fleshers had enjoyed an exemption from the duty leviable on cattle brought into Edinburgh. But when the House of Muir market ceased to be resorted to, and the graziers and owners of cattle sold to the fleshers directly, without resorting to any market, the magistrates then changed their mode of levying these dues (without consent of the legislature), by laying the custom upon all bestial brought into Edinburgh, whether for the purpose of being *bought* or *sold*, or for the purpose of being *killed* and consumed. In a suspension by the fleshers, conjoined with a declarator by the magistrates, Held that the magistrates were entitled so to levy the dues. Altered in the House of Lords as to find that it did not appear from the proofs taken in this case, that the magistrates had any right to exact any other dues than those they had exacted previous to this change in the mode of levying them; and case remitted for further consideration. — *Incorporation of Fleshers of Edinburgh v. Magistrates of Edinburgh*, 24th June 1802, p. 375.

BURGH.—(2.) The sons and sons in law of the several incorporated trades of Perth had the privilege of entering their respective corporations at lower or illusory dues. By the charters erecting the guildry corporation, the members of these several trades had a privilege also of entering the guildry upon paying smaller dues than was exacted from strangers. The sons and sons in law of the trades incorporation imagining that they had a similar right, sought to be entered as members on payment of the like small dues: Held that they could not claim to enter the guildry except

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————(2.) *Vide Jurisdiction.*

————(3.) In an action brought against the cautioners of the Receiver General of Land Tax, &c. for the pecuniary deficiencies of the Receiver General, it was alleged in defence by the cautioners that their bond did not cover the money deficiencies of the Court of Session money,—the duties of this department having been conferred upon him after the date of their bond, and without their consent. In the Court of Session this defence was repelled, but in the House of Lords the case was remitted to consider to what extent they were liable for the Court of Session money by their bond.—*Earl of Galloway, &c. v. His Majesty's Treasury*, 15th Jan. 1800, p. 165.

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———— of Dispensation.—*Vide Removing, and Landlord and Tenant.*

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———— *Vide Lease.*

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COPARTNERSHIP.—(1.) It was provided in a contract of copartnership that, on the dissolution of the concern, no division of the stock or profits should take place until the debts

due by the company, or the debts due by any of the partners to the company, should be first *paid* or *secured*. Circumstances in which it was held, that certain agreements subsequently gone into by the partners did not alter or affect this provision of the contract; and that a partner, on the dissolution of the copartnership, was entitled to withhold and refuse payment of another partner's share in the concern, until a debt due by another company, of which he was the sole surviving partner, was paid to the dissolved concern.—*Whitlaw v. Coats*, 19th May 1800, p. 148.

— (2.) By a clause in a contract of copartnership, it was provided that a balance should be annually struck, ascertaining each partner's share of stock, and his share of profit and loss, and that this was to be signed and engrossed in the sederunt book of the company. No exact date was fixed for this; but the balance continued to be struck annually in May. There was another clause of the contract which provided, in the event of the death or insolvency of any of the partners, that it should be optional in the survivors to wind up the concern, or to pay the representatives of the deceased partner, or the creditors of an insolvent one, his share in the concern, as it was ascertained by the last balance. The last balance struck in the concern was on 10th May 1796, giving £8522 of clear profit. There ought to have been another balance struck in the following year 1797, but this was not done. Mr. Orr, one of the partners, foreseeing his own death as probable, had repeatedly required the manager to strike the balance for that year, and took a notarial protest against his refusing to do so. He died in the month of July following. Held the surviving partners liable to account according to the balance that ought to have been struck in May 1797. Affirmed in the House of Lords.—

Forster, &c. v. Paterson, &c. 26th Feb. 1802, p. 295.

COPARTNERSHIP.—(3.) A copartnership was empowered as attorneys to invest their constituent's funds in certain securities, and remit the interest. They did so, but, several years afterwards, the company underwent a change, by some of the old partners retiring, which changes were intimated to the constituent. The appellant was one of those who retired from the old company. The new company continued to correspond with and act for the party; but there was no renewal of the power, or approval of their actings. They became bankrupt, with his securities and funds in their hands. In an action against the retired partner, held, in the special circumstances, that he was liable. — *Graham v. Hendersons*, 20th Dec. 1802, p. 421.

—— (4.) *Vide* Bill (2.)

—— (5.) A partner in the Glasgow Glass and Bottle Work Company had, by written agreement of the Company, a one-seventeenth share and also £100 per annum, allowed for the management of the concern. Subsequent to this agreement, separate and additional branches of business were undertaken, of which the management also devolved on him, with the approbation of the company. On the dissolution of the concern, he claimed, in addition to the £100, a farther emolument for the management of these concerns. — Held him entitled to this. — *Hamilton and others v. Geddes*, 26th Feb. 1805, p. 657.

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CUSTOM of Burgh.—*Vide* Burgh.

—— of the Country as to a Way-going Crop.—*Vide* Lease.

DAMAGES. — (1.) Circumstances in which it was held by the Court of Session that a tenant, whose lease was reduced, and his possession evicted from him, was entitled to damages against the granters of the

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DAMAGES.—(2.) for Printing and Publishing Libel.—A letter having been published in the Scots Chronicle newspaper giving an account of a riot and disturbance in Tranent, and reflecting on one of the deputy lieutenants of the county, held a libel, and £300 damages awarded.—*Morthland and Johnstone v. Cadell*, 26th June 1802, p. 385. *Vide* Libel.

—— (3.) An action of damages and relief was raised against the representatives of an agent for a superior (his client,) and the representatives of the superior himself, after the death of both, for having given the vassal an entry with a wrong superior. Held that an action, penal in its nature, did not transmit against heirs.—*Syme, W.S. v. Sir Wm. Erskine*, 22d July 1803, p. 510.

—— (4.) *Vide* Defamation.

—— (5.) for Nonfulfilment of Contract of Sale.—*Vide* Sale, (5.) and (4.)

DAM-DIKE.—*Vide* Salmon Fishing.

DEATH-BED.—A party in 1771 executed a settlement of his estates to one not his heir at law, under express reservation to revoke and alter in whole or in part, at any time in his life, *et etiam in articulo mortis*. In 1793 he executed a settlement, conveying his estate of Craufordland to and in favour of a different party, (Mr. Coutts) whereby he expressly revoked the deed 1771, but only to the effect of sustaining the conveyance of 1793. The deed 1793 was executed on deathbed. In a declarator and reduction of the deeds 1771 and 1793 brought by the heir at law, setting forth that as the deed 1771 was revoked by the deed 1793, and as the latter was executed on deathbed, his right as heir at law had revived. Held, that as the

- deed of 1771 was executed in favour of a stranger, she had no interest, as the deed 1793 could not be said to be in prejudice of the heir; and also, that she could not approbate and reprobate the same deed (1793); and that this deed being executed in virtue of reserved powers to alter on deathbed, was not reducible. In the House of Lords, the case was remitted for reconsideration, with considerable doubts expressed as to the soundness of the judgment.—*Crauford v. Coutts, &c.* 11th July 1799, p. 100.
- DECREE, Foreign.—*Vide* Insurance.
- Arbitral, Finality of,—*Vide* Submission.
- DEDUCTIONS from Rent.—*Vide* Landlord and Tenant.
- DEFAMATION.—Circumstances in which an action of damages brought by a factor and steward on an estate against his late employer for injurious expressions, tending to impeach him with neglect, maladministration, and dishonesty in his office, was dismissed, and the defence in justification of what was said as to his conduct sustained—*Donaldson v. Lord Perth*, 3d Feb. 1800, p. 112.
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- DELEGATION, Power of.—Right of attorney to delegate his powers.—*Vide* Copartnery (3.), and Attorney (2.)
- DELIVERY of Goods Bought.—This must be in reasonable time, where no time is fixed.—*Vide* Sale (5.)
- of Deed.—An heritable bond was granted by a party who was at the time insolvent, on the understanding that the deed was to be kept private, and no infeftment having been taken, or delivery of the bond proved, during the granter's life, held that the deed itself was not preferable, but only good as a *pari passu* claim.—*Macpherson v. Hannay*, 6th May 1803, p. 475.
- DEVOLUTION Clause.—In the entail of the Rosehaugh estate, Sir George Mackenzie provided for the contingency of that estate merging, by intermarriage, into the Bute family, by declaring, that if one and the same person should happen to succeed both to the Rosehaugh and Bute estate, then, in that case, if the person so succeeding should happen to have a second son, the estate of Rosehaugh was to go to him. The second Earl of Bute succeeded to both estates, and, consequently, denuded Rosehaugh in favour of James Stewart, his second son, who was afterwards Lord Privy Seal, and died in 1800 without issue. His elder brother, third Earl of Bute, had died before him in 1792, leaving several sons, namely, John, 4th Earl of Bute, and James Stewart Wortley, the second son. But, at the time of the Lord Privy Seal's death in 1800, John, the fourth Earl,

had also several sons ; and the question was, whether, according to the construction of the destination in this entail the devolution was to the second son of the third Earl or the second son of the fourth Earl? Held that the second son of the third Earl was to be preferred to succeed to the estate of Rosehaugh, as the person nearest to the maker of the entail. Affirmed in the House of Lords.—Marquis of Bute and his second Son *v.* Hon. James Stewart Wortley, 4th March 1803, p. 450.

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—— (License.)—A Distiller having a distiller’s license for

the manufacture of spirits, which expired on 10th October 1797, gave notice to the Crown on 10th June 1797, that he had ceased to be a distiller, and had disposed of the same to a third party, he at same time having 11,500 gallons of spirits on hands; the question was, whether he could sell these under his distillery license, which was then current and not expired, or was bound to take out a new license as for a wholesale dealer, he having ceased, *de facto*, to be a distiller? The Court of Exchequer, on a special verdict of a jury argued before them, found for the defendant in error, but reversed in the House of Lords, and held, that the moment he renounced the character of a distiller, he was bound to take out a license as a dealer or seller of spirits.—His Majesty’s Advocate General *v.* Menzies, 7th June 1799, p. 92.

DISTILLERY Laws.—(Survey).—Question, Whether the officers of excise were legally entitled to make a survey of distilleries with reference to a new act of parliament regulating the duties payable, and mode of exacting them, *before* the passing of the act; or, whether they could make such survey under any previous existing act not then repealed? By the Court of Exchequer in Scotland, held such survey before the passing of the act to be illegal. Reversed in the House of Lords.—Hume *v.* Haigs, 11th June 1799, p. 95.

DIVIDENDS, (Bank).—*Vide* Fiar and Liferenter.

DIVORCE.—In an action of divorce for adultery, brought by the husband against his wife, she was charged in the libel with having committed adultery with two persons therein named. In the proof led, meetings with these parties at night, in suspicious circumstances, were proved, but no direct proof of adultery. The defender, on her part, sought to adduce the alleged paramours as witnesses in her favour. The Com-

missaries having considered the nature of the proof led, held them to be inadmissible; and this, in an advocacy, was adhered to by the Court of Session. On appeal, reversed, and held that the *socii criminis* were equally competent witnesses for the defender as when adduced as witnesses for the pursuer, in an action of divorce for adultery. — *Marshall v. Marshall*, 8th April 1799, p. 72.

DOMICILE, (1.)—*Vide* Heritable Debt.

(2.)—*Roger Hog*, a Scotchman, went to London, and carried on business as a banker there. He married there an English lady, having previously entered into a contract of marriage, settling the wife's property. He afterwards purchased an estate in Scotland, (Newliston), and finally died there in 1789. His wife had died some years before him in 1760. He had then his house and business still in London, and had, subsequent to that date, entered into an extension of the copartnery carried on in London for five years longer, but he had been always occasionally residing in Scotland, and was so at the time of his wife's death, who died at Newliston. From his correspondence, an intention was expressed of making Scotland his final home. In a claim made by the surviving daughter of this marriage for the mother's share of the goods in communion as due at the dissolution of the marriage, by her death in 1760, it was, in answer to that claim, contended that such claim could not arise, because at that date Mr. Hog was domiciled in England. (2.) That the marriage being completed in England, there was an implied contract, that the rights, by the laws of England, arising from an English marriage, should attach. (3.) That no subsequent change of domicile could in law affect those rights so fixed; and, (4.) That there was also an express contract, which ought to be held as excluding the claim. The Court of Ses-

sion held that the domicile of *Roger Hog*, at his wife's death, was in Scotland; but, as the marriage and the marriage contract were English, there was no claim for the mother's share of the goods in communion. In the House of Lords, it was held that the domicile of *Roger Hog*, at his wife's death, was in Scotland—that the place where the marriage was celebrated, or *lex contractus matrimonii*, could not affect the claim, and that the contract of marriage itself had no reference to the husband's estate, but to the wife's fortune, and did not declare, although it might have declared, that the rights of an English marriage, according to the law of England, should follow them wherever they became domiciled, and therefore that the wife's third was claimable by her daughter. — *Lashley, &c. v. Hog*, 12th July 1804, p. 581.

ELECTION. — *Vide* "Legitim" and "Discharge."

ENCROACHMENT on Servitude of Foot-path.—*Vide* Servitude of Foot-path.

ENTAIL. (1.)—A reduction of the title and declarator of irritancy of an entail were brought fifty years after the alleged irritancy and contravention, founded on the allegation that the order of succession of the entail had been inverted and changed by an heir substitute of entail, who had possessed the estate on apparency for many years, and had then denuded in favour of the next heir of entail, in order to comply with the conditions of another tailzied estate to which he had succeeded. The defence stated to the action, *inter alia*, was, that the defender now enjoyed a prescriptive title which excluded the action. The Court of Session, on resuming the remit from the House of Lords, altered their former interlocutor, and found that the defender had produced a sufficient prescriptive title to exclude, and that no contravention had been committed, and if it

had that it was purgeable, and had in this case been purged; that an heir apparent was not legally capable of committing an act of contravention, and that an action of declarator of irritancy was necessary, but incompetent after his death. Reversed in the House of Lords, and held that the matters stated in the pursuer's summonses were not relevant to support the conclusions therein.—Fullerton, &c. v. Hamilton, 3d June 1801, p. 175.

ENTAIL.—(2.) The entail of Tillicoultry contained prohibitions against selling the estate, or contracting debt, or breaking or innovating the tailzie in any way. This was followed by an irritant clause, declaring, that *all which deeds* shall be null and void. Then followed this resolutive clause, declaring, that the said heirs of tailzie who might "contravene the said clauses irritant, or any of them," adding a special enumeration of these, without enumerating sales.—Held, that the resolutive clause in this entail was not sufficient to protect against the sale of the estate. Affirmed in the House of Lords.—Bruce v. Bruce, &c.—18th June 1801, p. 231.

—(3.) The question in this case was, Whether James Menzies was an heir of tailzie, and so included under the fetters of the entail, which were directed against the heir of tailzie alone; or to be considered as an institute, and free from these fetters? The Court of Session held that James Menzies was not an heir of entail under the deed 1697, but a donee, and, consequently, that he had powers to make a supplementary entail of the estate. In the House of Lords, case remitted for consideration.—Menzies of Culdares, &c. v. Beresford and Husband, 30th June 1801, p. 242.

—(4.)—*Vide* Devolution Clause.

—(5.)—The entail executed in this case contained clauses prohibitory, irritant, and resolutive, against selling or contracting debt; and the question was, Whether these

clauses respectively were directed against the institute, so as to include him as an heir of entail? The prohibitory and irritant clauses included him expressly by name, but the resolutive clause, which in this instance formed a part of the same clause or sentence with the irritant, only made reference to "the person or persons, heirs of tailzie foresaid." In an action at the instance of the creditor of the institute against the next heirs of tailzie, held that she was not liable in payment of this debt, against which the entail protected.—Syme v. Dickson, &c., 25th April 1803, p. 471.

ENTAIL.—(6.) Here, in the entail of Sir Robert Gordon, his eldest son was called by name, and the heirs male of his body in fee, whom failing, to a series of substitutes. The prohibitions, and irritant and resolutive clauses, were directed only against the "heirs of tailzie." Held, that the son was called as institute; and, therefore, as the fetters were not directed specially against him, he was not bound by the fetters of the same.—Marchioness of Titchfield v. Gordon.—20th June 1800, p. 157.

—(7.)—Circumstances in which an entail was held not to contain a sufficient resolutive clause directed against the sale of the estate.—Moncrieff v. Cunningham of Bonnington, 20th July 1804, p. 652.

EVICTIO of Lease.—*Vide* Lease.

ERROR in Subject of Contract.—*Vide* Contract.

EXECUTRY.—*Vide* Contract.

EXPENSES of Process.—Where the debtor settles with the client unknown to the agent, but without any contrivance on his part to defeat expenses, the agent proceeds with the suit at his peril.—Beatson v. Jameson, 5th March 1798, p. 27.

EXCHANGE between one country and another in the payment of the price in sale.—*Vide* Sale, (1.)

FACILITY.—(1.) Five leases of farms were granted by a nobleman to a merchant in Brechin, and were

- sought to be reduced, on the head of facility, fraud, and lesion. Held, the circumstances proved in this case not sufficient to set aside the leases, though granted while existing current leases had several years to run.—Viscount Arburthnot v. Gillies, 18th December 1797, p. 1.
- FACILITY.**—(2.) Circumstances in which a sale of property was sought to be reduced, on the head of facility in the grantor, and lesion and circumvention in the grantee. Held the proof, which was conflicting, not sufficient to set aside the sale of the property in the hands of a *bona fide* purchaser from the party who was charged with the fraud.—Duncan v. Ritchie, 2nd April 1798, p. 37.
- FACTOR.**—(1.) *Vide* Defamation.
 — (2.) *Vide* Sale, (6.)
 — (3.) For Trustees.—*Vide* Trust, (1.)
 — (4.) In an action raised for remuneration to a factor, where the factory drawn out in his favour left the amount of salary and remuneration blank, and where it was stated by the factor, on entering into the agreement, that the whole estates could not be managed for the sum (£200) proposed; but that he would undertake the management, leaving the remuneration unfixed. Held him entitled to £550 per annum for salary and other expenses. In the House of Lords, this was restricted to £450 per annum.—Duke of Queensberry v. M'Murdo, 14th May 1804, p. 505.
- FEE and Liferent.**—*Vide* Liferent and Fee.
- FIAR, or Liferenter.**—A truster, by his testamentary trust-deed, directed the whole 144 shares held by him in the Bank of Scotland, to be transferred immediately after his death, in his wife's name, in liferent, with power to her "to receive the dividends when due, or becoming due, thereon." The capital stock itself was conveyed to the trustees, "with the whole dividends or profits therefrom arising." A
- bonus* was declared soon after the truster's death, of £1066, and the question was, Whether this extraordinary dividend fell to the fiars or liferenter. The Court of Session held it to go to the liferenter. In the House of Lords, this was reversed, and held it to go to fiars, as an accretion to capital.—Irving, &c. v. Houstoun, 27th July 1803, p. 521.
- FOREIGN Decree.**—(1.) A decree of the Court of Chancery in England had found, in regard to the deceased's executry in England, (who died domiciled there,) that heritable bonds were a charge on the personal estate; and, consequently, that an heritable debt of £2000 on the deceased's heritable estate in Scotland fell to be deducted in accounting for that executry. The executors thereupon brought an action of relief in the courts of Scotland against the heir of provision in the heritable estate. Held him liable in relief, and that the foreign decree was neither *res judicata*, nor had decided the question of relief competent to the executors against the heir, who, according to the law of heritable estate and succession in Scotland, was liable to pay that debt.—Drummond, &c. v. Drummond, &c., 20th Feb. 1799, p. 66.
- (2.) Foreign attorneys remitted money to their agents in this country to be paid by them to the executors of a deceased's relative. They would not hand over the amount without retaining a sum in payment of their accounts as agents for the attorneys. In an action to compel payment, an objection was stated that they were not liable to account for foreign executry in this country, but it was repelled.—Bogle and others v. Anderson, &c., 13th Nov. 1801, p. 249.
- (3.) Action was brought in the Court of Session against Graham, residing in Calcutta, who was the retired member of a firm in India which afterwards became bankrupt

with the pursuer's securities and funds in its possession. Held him liable to make good the loss, and that the Court of Session had jurisdiction in the question.—*Graham v. Hendersons, &c.*, 20th December 1802, p. 421.

FOREIGN.—(4.) Held it no objection in bankrupt suing for his discharge, that he is and has been for many years a resident in a foreign country.—*Marshall, &c. v. Stein*, 27th May 1803, p. 480.

—(5.) A foreign sentence of condemnation of enemy's property is conclusive in negating a warranty of neutrality in a policy of insurance, on a vessel and cargo insured, and the courts of this country will not inquire into those sentences with the view to contradict what appears on the face of them.—*Lothian, &c. v. Henderson, Riddle, and Co.*—11th and 13th July 1803, p. 484.

FRAUD.—(1.) *Vide* Facility, (1.) and (2.) and Sale, (2.)

—(2.) *Vide* Cessio.

FREEHOLD Qualification—Objections having been stated to the enrolment of a freeholder in the county of Stirling, in respect that he had not the requisite qualification in land, to the amount and value required by act of parliament. Circumstances in which this objection was repelled;—his retour of service containing sufficient evidence of the value of the lands, distinct from the office of coroner attached to them, which office, it was alleged, was of no appreciable value.—*Davidson v. Fleming*, 18th April 1804, p. 554.

FISHING.—*Vide* Salmon Fishing.

Goods sold must be fit for the purpose for which they are bought.—*Vide* Sale, (4.)

— in Communion.—Circumstances in which it was held, that the daughter of Roger Hog was entitled to claim the share of the goods in communion, in right of her mother, as at the dissolution of the marriage

by her death, although there was an antenuptial contract entered into in England, settling the wife's portion, and the marriage was an English marriage (*vide Domicile*).—*Lashley, &c. v. Hog*, 10th and 12th July 1804, p. 581.

HEARSAY Evidence is competent in questions of pedigree and propinquity.—*McCallum, &c. v. Campbell, &c.* 12th March 1798, p. 32.

HEIRS, Relief among them.—*Vide* Heritable Debt.

— of Tailzie.—*Vide* Entail.

— Apparent.—Held, in the Court of Session, that an heir apparent in possession was legally incapable of committing an act of contravention of an entail. In the House of Lords the case went off on another ground.—*Fullerton, &c. v. Hamilton*.—3d June 1801, p. 175.

— Male.—In the dispositive clause of a settlement, an estate was conveyed to a person named, and the heirs male of his body, and to another person, and the heirs male of his body; and to a third person named, and his *heirs whatsoever*. In the procuratory of resignation the person last mentioned was not called along with his heirs whatsoever or general, but his *heirs male*. There was no prohibition against altering the order of succession. The previous heirs male had changed the destination of the estate; and the appellant, (who was not an heir male of John Carruthers, the third mentioned party, but the grandson of a brother of John Carruthers, through his mother, a daughter of his brother), claimed the estate. Held, in the construction of the dispositive and resignation clauses, that the appellant was not entitled to the estate. Affirmed in the House of Lords—the Lord Chancellor Eldon stating that the dispositive clause was to be explained by what appeared in the procuratory of resignation.—*Halli-*

- day *v.* Maxwell and Husband.—9th June 1802, p. 346.
- HEIRS.—Import of the term, “heirs” in a lease; and whether it includes an heir nominate of the tenant.—*Vide* Lease.
- HERITABLE or Moveable.—An officer in India, and in the East India Company’s Service, remitted home to his attorneys in England, two sums of £2500 and £3000, with instructions to lay out the same in landed security. This was done accordingly, and the bonds taken in their name in trust for him. Sometime afterwards, he being then still in India, made a will, appointing trustees, and after leaving several legacies, bequeathed the residue to the appellant, Major Kyde. Mrs. Lindsay, as his heiress at law, claimed the heritable bonds, which she alleged could not be carried by a will. Held her entitled to these.—*Kyde v. Davidson*, (Lindsay’s Trustee).—16th May 1798, p. 63.
- Debt.—Held, in regard to a person who died domiciled in England, and who had an heritable estate in Scotland, burdened with an heritable bond of £2000, that though the heritable bond, as in a question in England, was held, according to the law of England, a burden on the executry, yet that the executors were entitled to come to this country and claim relief against the heir of the heritable estate, who was bound to take that estate with all its burdens.—*Drummond, &c. v. Drummond, &c.*, 20th February 1799, p. 66.
- Security.—A party granted a real security to his brother for a debt owing him, on which no infestment was taken until after the grantor’s death. His death happened about three years after its date, when it was discovered that he was insolvent, and must have been so at the time of granting the heritable bond, on the ground of its being a fraudulent preference, granted by an insolvent, and to a conjunct and confident person. Circumstances in which these objections were repelled, and affirmed in the House of Lords.—*Macpherson and others v. Ramsay Hannay*, 6th May 1803, p. 475.
- ILLEGAL Combination.—Held it to be illegal for the posting masters in Edinburgh to enter into a combination to raise the rates of posting.—*Smith and others v. Scott*, 8th Jan. 1798, p. 17.
- INSURANCE.—A ship and cargo were insured in Glasgow, (the vessel as an American ship, and the cargo as American property), on her voyage from America to Rotterdam. The French war was then pending, and the vessel sailed with all the necessary documents on board which American vessels were in use to carry, in terms of existing treaties between America and France, as well as the law of nations applicable to neutrals. But it not being known at Glasgow when the insurance was effected, or in America when the ship sailed, that a muster roll, or Roll d’Equipage, which by a recent ordinance or arrêt of the French government was also necessary to be carried by such vessels, and not having this document on board, she was captured in the course of the voyage, and condemned in the French prize courts as enemy’s property. In an action for the sum in the policy, the defence by the underwriters was, that as the ship was condemned as enemy’s property, this decree was conclusive in negating the warranty of neutrality, and they were not liable. Held, by the terms of a relative agreement, which qualified that warranty, that the underwriters bound themselves to be liable in all events. Affirmed in the House of Lords, after taking the opinion of the whole judges of England.—*Lothian and others v. Henderson, Riddle, and Company, &c.*, 8th June, and 11th and 13th July 1803, p. 484.

INTEREST.—A widow, in accounting for the estate of her deceased husband, the funds of which were uplifted by her, was held liable in five per cent. interest, although she alleged that she had intromitted in virtue of an absolute conveyance in her favour, and therefore in *bona fide*. Also, held her liable at the same rate of interest for all rents recovered, or which ought to have been recovered. Lord Eldon, in the House of Lords, said, that *bona fides* was out of the question, seeing that the conveyances were reduced, some of them on the ground of fraud on her part. —Sir Wilfred Lawson, &c. v. Maxwell and others.—7th April 1803, p. 464.

IRRITANCY, Declarator of,—Held, in order to make the contravention of an entail effectual, an action of declarator of irritancy was necessary; but that this action was incompetent after the contravener's death.—Fullerton, &c. v. Hamilton, 3d June 1801, p. 175.

JURISDICTION.—(1.) Held, in the case of an illegal combination of postmasters to raise the rate of posting, that the justices had no jurisdiction in fixing the rate of posting.—Smith and others v. Scott, 8th January 1798, p. 17.

— (2.) In the appointment of a parish schoolmaster, the minister of the parish dissented to the person appointed by the other heritors. He renewed his dissent before the presbytery, who found him qualified. The minister then appealed to the synod, which the presbytery having allowed, the schoolmaster brought an advocacy to the Court of Session. The synod reversed the sentence of the presbytery, notwithstanding a sist had been intimated to it in the advocacy, whereupon the schoolmaster offered a petition and complaint to the Court of Session, and the following questions of law were debated. 1. Whether the sentence of the presbytery was final?

2. Whether, if not final, the appeal lay to the synod and other higher ecclesiastical court? Or, 3. Whether the appeal was to the Court of Session? Held the review to be in the Court of Session. Reversed in the House of Lords, with opinion, that the review, if any, was competent to the higher ecclesiastical courts.—McCulloch, &c. v. Allan, 18th Feb. 1800, p. 119.

JURISDICTION.—(3.) In an action raised in the Court of Session against the cautioners of a debtor of the crown, with the view of having decree of constitution to found an adjudication against an heritable estate, while another action was pending in the Court of Exchequer in regard to the same debt. The cautioners objected to the competency of the action. 1. Because the Court of Exchequer had alone jurisdiction in the matter; and, 2. Because there was an action already pending there for the debt; and, therefore, *lis alibi pendens*, a good objection. Held the action competent before the Court of Session, to the effect for which it was brought, to found diligence by adjudication against the heritable estate, and that there was no *lis alibi pendens*.—Earl of Galloway, &c. v. Lords Commissioners of His Majesty's Treasury, 15th July 1800, p. 165.

LANDLORD and Tenant.—(1.) Circumstances in which the tenant was held entitled to deductions from his rent on account of part of the lands being taken away to make public drains and roads; also to deduction for the insufficiency of houses and steadings blown down by the wind. Reversed in the House of Lords, and held the tenant not entitled to these deductions.—Kinnaird v. Matthewson, 27th December 1802, p. 429.

— (2.) In an action of removing, raised against tenants, they stated several objections to the landlord's title to sue the action. Circumstances in which these were repelled.

Finlayson and others v. Innes, 28th Feb. 1803, p. 443.

LEASE.—(1.) A tenant entered into a lease of a farm at Whitsunday 1791, without any right to a grain crop at his entry. If the lease was broken before the term of its expiry, it was provided that the tenant was to receive a full year's rent on leaving the farm, for defraying the expense of sowing out the lands that year with grass seeds and clover, and in consideration of his leaving the whole lands in grass, and removing at Whitsunday. Nothing was said about a way-going crop, which he now claimed. In the Court of Session, held the tenant entitled to a way-going crop. Reversed in the House of Lords.—Macmichan v. Hutchison, 5th May 1801, p. 170.

— (2.) Eviction.—*Vide* Damages for Eviction of Lease.

— (3.) This was a question similar to No. 1. The lease bore a Whitsunday entry, and declared that the tenant's removal, on the expiry of the lease, should be at Whitsunday, from the lands, &c.; and it bound him to consume the whole straw and dung upon the lands during the currency of the lease, and to carry none of the dung away with him during the last year of the lease. The tenant began to plough and to lay down a crop to be reaped after the term (Whitsunday) at which he was taken bound to remove. The Court of Session held the tenant entitled to a way-going crop. In the House of Lords, the Lord Chancellor pronounced a judgment, setting forth, that the tenant was not entitled in this case to a way-going crop, on the principle that parties, when they enter into a contract, are presumed to state in that contract the rights which each are to enjoy—and that if the tenant was to have a way-going crop it ought to have been expressly mentioned; and remit made with this declaration.—

Scott v. Brodie, &c., 10th March 1802, p. 311.

LEASE (4.) A lease was granted for thirty-eight years to the tenant, *and his heirs, secluding assignees* and subtenants; and if the tenant was alive at the expiry thereof, for his lifetime, or for the lifetime "of the *heir* or *heirs* of the said William Grieve." In consequence of the tenant's eldest son having chosen a different mode of life, the tenant, before his death, left a nomination of heirs in favour of his second son, disposing the lease to him. The landlord, after the tenant's death, objected to this, stating that the word "*heirs*" in the lease, meant only the heir at law, and not heirs of destination. In the Court of Session, the tenant was decreed to remove. In the House of Lords, the case was remitted with considerable doubt expressed as to the judgment below.—Grieve v. Cuninghame, &c. 19th June 1804, p. 571.

— (5.) Reduction of.—*Vide* Facility.

LEGITIM.—(1.) Circumstances in which it was held, that a party entitled to legitim had discharged that claim subsequent to his father's death, although not by the discharges granted in his lifetime.—Hog, &c. v. Thwaytes, &c. 24th June 1802, p. 364.

— (2.) Circumstances in which it was held that a party claiming successfully her legitim, that that claim must suffer abatement of whatever sums she may have received during her father's life, as a part of her portion, and that she could not claim the farther provisions left by her father at his death. 2. That in accounting for this legitim, the debt due by the father to his eldest son must be deducted.—Lashley v. Hog, 10th and 12th July 1804, p. 581.

— (3.) In the House of Lords, in deciding the above case, it was laid down, that if the legitim could not be disappointed by the father,

by a regular testamentary disposition, so neither could it be so by the transfer of bank stock made by the father in his son's name, immediately before his death.—Above case, Lord Eldon's speech, p. 638, *et seq.*

LIFERENT and Fee.—Deeds were executed by the granter, conveying heritable estates to his natural son, in liferent, for his liferent use only, (in another deed for his liferent use alienary), and to the heirs lawfully to be procreated of his body in fee." Held, in a question with creditors, that the substantial fee was in the children, and not in the father.—*Smith, &c. v. Newlands, &c.*, 26th April 1798, p. 43.

LIBEL.—In an action of damages raised for publishing a letter in a newspaper, found to be a libel, Held it not relevant to charge one who was alleged to be editor, "as legal adviser or abettor of that paper, or as held, or believed, and understood to be, concerned in it." It was also much debated, whether the same party, supposed to be the editor of the newspaper, could be legally held responsible, he having ceased to act as editor sometime before. Held, that as he still continued to take a concern in the newspaper, and conducted the London correspondence, and occasionally contributed, he was responsible.—*Morthland and Johnstone v. Cadell*, 26th June 1802, p. 385.

LIS ALIBI Pendens.—*Vide Jurisdiction.* (3.)

MANDATE.—*Vide Retention.*

MARRIAGE, Constitution of.—A party alleged himself to be the lawful son of George Heriot, second son of Robert Heriot of Ramornie, and served himself heir to his deceased father, before the bailies of Canon-gate. In the reduction of this service, on the head of illegitimacy, held, that the appellant had failed to adduce sufficient proof that his

mother was lawfully married to his reputed father by celebration by a clergyman, or by cohabitation as man and wife, or by general repute.—*Heriot v. Maitland Mackgill, &c.* 29th April 1799, p. 77.

MINORITY.—In an action of declarator of contravention of an entail, the defence stated, *inter alia*, was, that the defender held a prescriptive title which excluded the action. The reply to this defence was, that the period of the pursuer's minority behoved to be deducted. It was answered, that an heir substitute of entail could not plead minority. A majority of the Court of Session held that the *next* heir substitute, that is, the party entitled, as the *verus dominus*, to take up the estate, on failure or contravention of the immediately preceding heir of entail, was entitled to plead minority, but that remote substitutes were not. In the House of Lords the judgment was reversed on another ground, namely, the want of title in the pursuer; it appearing that the pursuer was not the *nearest* or *next* heir substitute entitled to succeed, which was the title set forth in her summonses, but a remote heir substitute.—*Fullerton, &c. v. Hamilton*, 3d June 1801, p. 175.

NEGLECT.—*Vide Agent and Client,* (2.)

OFFER and Acceptance.—*Vide Sale,* (3.)

PACTUM Illicitum.—*Vide Sale,* (7.)

PART and Pertinent.—*Vide Servitude of Pasturage.*

PARTICEPS Criminis.—*Vide Proof, and Socii Criminis.*

PENAL Actions do not transmit against heirs.—(1.) *Vide Damages,* (3.)

——— (2.) *Vide Irritancy.*

PENALTIES in an Adjudication. — In discharging a debt due to the trust on adjudication and decree, the factor, who was also a trustee, gave

- down £499 of penalties, in settling with the debtor. In an action raised for this sum, 25 years thereafter, the Court of Session held the party liable, but the House of Lords reversed this judgment, and dismissed the action.—*Douglas v. Murray and others*, 29th Dec. 1797, p. 4.
- POSTMASTERS.—*Vide* Illegal Combination.
- POWER of Attorney. — *Vide* Copartnery, (3.)
- PRE-EMPTION Clause. — *Vide* Real Burden.
- PREScriptive Possession.—*Vide* Proximity.
- Title.—*Vide* Servitude, (1.)
- or Immemorial Usage.—*Vide* Salmon Fishing, (4.)
- PREScription.—(1.) A declarator and reduction was brought, founded on an alleged contravention of an entail, by an heir of entail, in consequence of the order of succession therein set forth having been inverted and changed, and the positive prescription having run on the title so made up, it was stated in defence that the defender had thereby acquired a prescriptive title which excluded the action. Held in the Court of Session that the defender had produced sufficient prescriptive title to exclude the action. In the House of Lords this interlocutor was reversed, but only to the effect of substituting another in its place, declaring that the matters contained in the pursuer's summonses were insufficient to support the conclusions therein set forth.—*Fullerton, &c. v. Hamilton*, 3d June 1801, p. 175.
- (2.) Held that a right of cruive fishings was established, although the respondents had produced no title to the salmon fishing, but only a charter from the crown conveying the lands *cum piscationibus*, followed by immemorial usage of such fishing.—*Johnstone and others v. Stotts*, 18th Feb. 1802, p. 274.
- (3.) Circumstances in which a servitude of common was held not to have been acquired by prescriptive possession. — *Rutherford v. Stormonth*, 25th July 1803, p. 515.
- PREScription.—(4.) In a declarator of property in regard to the coal under the land, which had been disjoined from the property of the land, by the superior reserving it to himself in selling the land, held where the one had a charter earlier in date expressly mentioning the coal upon which the long prescription had run, but no possession; and the other had also a charter expressly conveying the coal, fortified by prescriptive possession and working the coal, that the latter had right to the coal.—*Anderson v. Cadells*, 27th July 1803, p. 532.
- PRIVILEGES of Trades Incorporations. — *Vide* Burgh, (2.)
- (Exclusive) of the Writers to the Signet in regard to business before the Court.—*The Writers to the Signet v. Solicitors before the Supreme Courts*, 7th April 1802, p. 326.
- PROCESS.—(1.) A party who was summoned for £3. 5s. 10d. called on the pursuer at his place of business, and not finding him at home, paid the amount to his clerk, and at same time offered payment of whatever expenses might be incurred. The principal sum was accepted and receipt granted, but the expenses were declined, as the clerk did not know their amount. There was no contrivance on the part of the defender to settle with the client out of the knowledge of his agent. The agent, however, proceeded and took decree in the action in absence, and sent the defender a note of the expenses (£3. 11s. 3d.), and raised horning and charged thereon. The defender suspended, but was found liable in the amount, with the whole costs of suit, amounting to £35. In the House of Lords this was reversed, on the ground that there was no contrivance on the debtor's part to settle with the client without the knowledge of the agent, and was only liable for the amount of ex-

penses due at the time he tendered the amount.—*Beatson v. Jamieson*, 5th March 1798, p. 27.

PROCESS. (2.) A second summons was raised at same time with a reduction and declarator of contravention of an entail, having in view to declare the irritancy. It had been allowed to stand over without any conjunction, until after the decision in the Court of Session and the House of Lords in the first summons, when it was for the first time sought that it should be conjoined. This was refused as incompetent in *hoc statu*.—*Fullerton, &c. v. Hamilton*, 3d June 1801, p. 175.

— (3.) In a claim of damages for the eviction of a lease from the tenant, the Court of Session, before any sum was declared to be due, or damage ascertained, on motion made for to allow decree to go out to the effect of allowing adjudication to be led against the heritable estate, decerned in terms of the conclusions of the libel to that effect, reserving all objections *contra executionem*.—*Plasket and others v. Stewart, &c.* 18th June 1801, p. 214.

— (4.) Objection was stated to the summons in action of damages, that three weeks after it was served a new summons was raised and signed, and to which, as was alleged, was affixed the date of the first summons; and this, it was alleged, was done in order to remedy a defect in that summons. Held the objection not good.—*Morthland and Johnstone v. Cadell*, 26th June 1802, p. 385.

— (5.) *Vide* Summons.

PROOF.—(1.) In an action of damages for libel brought against two parties, the one the publisher, the other the editor and proprietor of the Scots Chronicle newspaper, the defence stated by the latter was, that he was not the editor and proprietor of that paper. A witness (the appellant) was summoned as a haver to produce all the account books, ledgers, &c. prior to his becoming the proprietor, in order to prove that the defender

was proprietor at the time mentioned. The witness refused to produce these, in respect that it would disclose his own private affairs. The Court found him bound to allow inspection of the books to the commissioner, and to take excerpts. On appeal by the witness this was affirmed.—*Paul v. Cadell*, 30th May 1799, p. 89.

PROOF.—(2.) Found, in regard to bank stock, it competent for the pursuers to prove the alleged trust with regard to these bank shares, only *scripto vel juramento*. And in the House of Lords held that the trust disposition of the father, leaving the personal estate to the son, for the purpose of being laid out in land, to be entailed, and the declaration (deposition) of the son in regard to the bank stock, were evidence of the trust.—*Lashley, &c. v. Hog*, 10th and 12th July 1804, p. 581-590.

— (3.) In an action of divorce for adultery brought by the husband against his wife, she was charged with having committed adultery with persons named. After proof on the pursuer's part, she offered to adduce the alleged paramours as witnesses in her favour; Held in the Commissary Court and Court of Session that this was incompetent. Reversed in the House of Lords, and held them to be admissible.—*Marshall v. Marshall*, 8th April 1799, p. 72.

PROPERTY.—(1.) *Vide* Servitude of Pasturage.

— (2.) *Vide* Servitude of Common.

— (3.) In a competition for the property of the coal between parties holding charters in which the coal was mentioned, and upon which prescription had run, held that the coal belonged to the one who had possessed the coal by working it, supported as this was by the state of the titles, where the property of the coal had always been conveyed distinct from the property of the land from which it had been disjoined by the su-

perior having reserved it.—Anderson v. Cadells, 27th July 1803, p. 532

QUANTUM Meruit.—*Vide* Recompense, and Factor.

REAL Burden.—In a contract of feu between the superior and vassal, there was no pre-emption clause, but it had been understood that this was to exist as an inherent part of the right, and subsequently, in a conveyance by the vassal to his brother of the subject, this was established by the latter granting a bond becoming bound to give the superior the first option of the purchase. This latter party was never infeft, nor had the pre-emption clause ever become a part of the titles by inserting it in the infeftments or otherwise. Held in the Court of Session that this right of pre-emption, in virtue of the back bond, was not a real burden on the lands, and could not be effectual against creditors. In the House of Lords the case was remitted for reconsideration.—Preston v. Earl of Dundonald, &c. 13th April 1802, p. 331.—Note. Under this remit, the Court of Session found, that had the clause of pre-emption in the back bond been inserted in the titles and infeftments of the said lands, it would have constituted a real burden; but, as it was not inserted, there was no real burden constituted; but as to the personal obligation itself, the Court found that as the person who granted the back bond had only a personal right to the lands in question, which never was completed in his favour, or in favour of that of his successor, therefore *that* personal right remained qualified by the condition in the back bond, giving the right of pre-emption to the superior, and, therefore, that the diligence of the vassal's creditors could only attach the property subject to that personal right.—See Fac. Coll. xiii. p. 456.

— Security.—*Vide* Security.

RECOMPENSE.—*Vide* Factor, (4.)

REMOVING.—*Vide* Landlord and Tenant.

RELEVANCY.—Held it not relevant, in an action of damages for publication of a libel in a newspaper, to charge one of the defenders, who was alleged to be editor, “as legal adviser or abettor of that paper, and held, or believed, and understood to be concerned in it.”—Morthland and Johnstone v. Cadell, 26th June 1802, p. 385.

RELIEF.—*Vide* Trust.

RESOLUTIVE Clause.—*Vide* Entail.

RES Judicata.—(1.) Circumstances in which a former decree was not held to be a *res judicata* in bar of the action.—Marchioness of Titchfield v. Gordon, 20th June 1800, p. 157.

— (2.) Circumstances in which the Court sustained the defence of *res judicata*, but this was reversed in the House of Lords—Arbuthnott and Gillies v. Scott, 25th May 1802, p. 337.

— (3.) Circumstances in which the defence of *res judicata* was disregarded, the decree formerly obtained being in an action not with the same party.—Halliday v. Maxwell, 9th June 1802, p. 348.

RETENTION.—(1.) *Vide* Copartnery, (1.)

— (2.) Circumstances in which agents in this country of foreign attorneys to whom money had been remitted, for the purpose of paying it over to executors, was not entitled to retain a sum to cover their accounts against the foreign attorneys.—Bogle and others v. Anderson, &c. 13th Nov. 1801, p. 249.

RETOUR, Construction of the “Valent” Clause in a Retour.—See Freehold Qualification.

REVOCATION, Clause of.—(1.) *Vide* Deathbed.

— (2.) *Vide* Deed.

SALE.—(1.) Timber having been sold, but, in consequence of the buyer's insolvency before delivery, they wrote the sellers to sell it as on their account. Held that in this

sale, the price received for the timber, and the price agreed to be paid by the original buyers was to be taken into account along with the difference of exchange or value of money as between St. Petersburg and London, when the timber was offered back, and when it was first sold,—the amount being stated in Russian money.—*M'Leans v. Thorley, Bolton and Co. and Attorney*, 26th Feb. 1798, p. 22.

SALE.—(2.) Circumstances in which a sale of property was sought to be reduced, on the head of facility in the grantor, and lesion and circumvention in the grantee. Held the proof (which was conflicting) not sufficient to set aside the sale of the property in the hands of a *bona fide* purchaser from the party who was charged with the fraud.—*Duncan v. Ritchie*, 2d April 1798, p. 37.

— (3.) In a sale of spirits, the buyer wrote the seller, making proposals for purchasing spirits, and requesting to know, in course of post, the lowest price at which he would sell the spirits for cash. The seller replied that he would give him the spirits at 3s. 2d. for cash, and 3s. 4d. at three months credit; and requesting to know, in course of post, whether he would accept. The buyer did not reply in course of post, nor for six days thereafter, when, in the interval, the price of spirits had risen in the market. The seller then wrote him that he could not then sell him the spirits at the prices mentioned. In an action of damages for nonfulfilment, held him liable; reversed in the House of Lords, on the ground, that as the condition on which the offer was made was not complied with, the appellants were entitled to consider it at an end.—*Stein v. Farries*, 24th March 1800, p. 131.

— (4.) Certain potashes were represented by the sellers as of equal efficacy with the American potash, for bleaching and whitening clothes,

and much cheaper. The buyer bought several casks on the faith of this representation. In using them, they whitened the clothes equally well, but the goods, after being sent home and unpacked, when exposed to the atmosphere, lost their white colour, and assumed a reddish or bluish colour, according to the humidity of the atmosphere. In an action for the price, conjoined with an action of damages raised by the buyer, held that she was not liable in the price, but entitled to damages, and damages awarded accordingly. *Birnie and Co. v. Weir*, 16th May 1800, p. 144.

SALE.—(5.) A sale of twelve puncheons of spirits, distilled from molasses, was bargained for, and four puncheons delivered. The buyer continued urging the delivery of the remainder until after an act of parliament was passed on 18th Dec. 1795, prohibiting distillation of spirits from molasses, and annulling all bargains or contracts for the delivery of such. The sellers in consequence, refused to furnish the spirits, and, in an action of damages, stated the act of parliament as their defence. Held in the Court of Session that there was no evidence to show that they were bound to deliver before the 18th Dec. 1795. Reversed in the House of Lords, and held, that from the correspondence adduced, the sellers were bound to deliver the remaining puncheons within a reasonable time, and therefore before the passing of the act, and remit made to assess the damages.—*Philips v. Blair and Martin*, 16th Nov. 1801, p. 256.

— (6.) Circumstances in which it was held that the purchase of goods by a merchant in Glasgow, for export to a foreign merchant, was such as made the foreign merchant liable to the party from whom the goods were bought; although it was contended that a foreign merchant, who procures goods from a correspondent

in this country, to whom he allows a commission, was not so directly liable. Reversed in the House of Lords, and held that the foreign merchant was not liable in the special circumstances of this case.—*Wilkie v. Greig*, 1st Dec. 1801, p. 265.

SALE.—(7.) A party was appointed a deputy clerk of the Bills, by an agreement which amounted to a sale of the office. The party was to pay £2700, one half in cash, the other by a right to two-fifths of the fees. Thereafter new fees were appointed to be exacted, increasing materially the returns of the office. Held by the Court of Session that the agreement was good as to the old fees, but not as to the additional or new fees. The party acquiesced in this judgment, but his opponent took the case, as to the new fees, to the House of Lords. Held in the House of Lords, that as the respondent had not appealed against the interlocutor sustaining the legality of the agreement, no judgment could be pronounced on that question; but strong opinion intimated that such sales and agreements were illegal.—*Stewart v. Miller*, 25th Feb. 1802, p. 286.

SALMON Fishing.—(1.) 1. Circumstances in which a new mode of fishing, by means of doachs, was construed to fall within the description of a cruive fishing, and subjected to the rules and regulations of the statutes regulating that mode of fishing, and therefore, that certain blind eyes, and other artificial obstructions used, must be removed as illegal. 2. That this right of cruive fishing was established, although the respondents had produced no title to the salmon fishing, but only a charter from the crown, conveying the lands *cum piscationibus*, followed by immemorial usage of such fishing.—*Johnstone and others v. Stotta*, 18th Feb. 1802, p. 274.

— (2.) The upper heritors on

the river North Esk complained of a dam dike erected by a lower heritor, of a certain construction and height, without openings or gaps being left to allow a passage for the fish upwards, and apparently to benefit his own fishings below, rather than the mills which it was professed to serve. The defence to the action was, 1. *res judicata*; and, 2. immemorial possession of the dam dike as so constructed, which was necessary for the supply of the defender's mills with sufficiency of water. The Court of Session, after a proof, sustained the defences. Reversed in the House of Lords.—*Arbuthnott and others v. Scott and others*, 25th May 1802, p. 337.

SALMON Fishing.—(3.) Mr. Hunter's lands of Seaside were situated on the Tay, fifteen miles below the city of Perth, where that river is about two miles broad at full tide, but, when the tide retired, the proper channel of the river was only about half a mile broad, and, consequently, a great area of fifteen acres of sand was left dry. On these sands Mr. Hunter made an enclosure by means of stakes and netting, contrived in such a manner as to open when the tide flowed, and shut when it ebbed. He alleged, that as the water was always salt at that place, and as the acts of parliament did not apply to arms of the sea, or to friths or estuaries, but only to rivers, he had right to erect these stake nets. Held that the upper heritors were entitled to interdict against the erection of these stake nets. Affirmed in the House of Lords.—*Hunter and others v. Earl of Kinnoul and others*, 9th May 1804, p. 561.

— (4.) (1.) Circumstances in which an interdict was refused to be granted to prohibit the same kind of machinery by stake nets some ten miles farther down the Tay than Mr. Hunter's, where the Tay widened into the frith or sea, but bill passed to try the question. (2.) That the decision in Mr. Hunter's case was no

res judicata so as to conclude the question.—Earl of Kinnoul, &c. *v.* Dalgleish and Lessees; and Earl of Kinnoul, &c. *v.* Hon. Mr. Maule, and Gray his Tenant, Feb. 1805, p. 671.

SALMON Fishing.—(5.) The lessees of a salmon fishing on the river Leven having resorted to a mode of fishing by means of fixed stobs and nets placed at the mouth of the river, so closely together, and the nets so close in the meshes as to prevent the fish from getting up the river. Held in the Court of Session that as no right to a cruive fishing was shewn, he was not entitled to exercise this right of fishing by those stake nets in virtue of immemorial use only. In the House of Lords remitted to reconsider, 1. Whether the statutes in regard to cruive fishing could apply to this mode of fishing; and, 2. Whether immemorial usage of such fishing could be destroyed or affected by its merely bearing an analogy to cruive fishing.—Sir James Colquhoun *v.* Provost and Magistrates of Dumbarton and others, 18th June 1801, p. 221.

SCHOOLMASTER. — *Vide* Jurisdiction, (2.)

SEPTENNIAL Limitation.—A decree in absence had been obtained against the representative of a cautioner in a bond, within the seven years, together with certain correspondence had with his factor seeking delay to pay the debt. Held the correspondence seeking delay sufficient to elide the prescription, though no “legal diligence,” in the sense of the statute, had followed on the debt *within* the seven years.—Riddick *v.* Douglas, Heron and Co., 2d April 1800, p. 133.

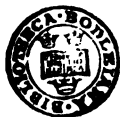
SERVITUDE of Sea-Ware.—An action of declarator having been raised to have it found that the appellant had acquired a servitude of taking sea-ware from a neighbouring farm, the lands of which extended to the shore, on which the sea-ware was cast, founded on the immemorial use

and exercise of such right. Held that as the use and custom of taking the sea-ware from these lands applied to a time when he was a mere tenant of the farm under a lease, and not as proprietor of the farm, he had no title to prescribe a right of servitude such as was claimed.—Macdonald *v.* Macdonald, &c. 22d June 1801, p. 237.

SERVITUDE of Footpath.—Circumstances in which it was held that the inhabitants of Rutherglen, Glasgow, Blantyre, and Hamilton, had a servitude of footpath to and from the Glasgow Green, along the banks of the Clyde to Rutherglen Bridge, and thence to Glasgow Green, acquired by immemorial use and possession; and that the proprietor of the lands on both sides of the footpath was not entitled to erect an arch over the footpath so as to injure it, by rendering the footpath dark and wet below the arch, or a low, dark, and dirty passage, but might erect an arch to connect the grounds on both sides, fifteen feet in length and seven feet four inches in height, so as not to produce these injurious effects.—Allans *v.* Provost and Bailies of Rutherglen, 19th Dec. 1801, p. 269.

— of Pasturage.—In a dispute as to the property of certain grazing grounds on the confines of Atholl Forest, Held, 1. That the property of these grazing grounds belonged to the Duke of Atholl; but that they were subject to the servitude of pasturing and grazing sheep, cattle, &c. in favour of the appellant, whose barony marched with the Duke's, although this servitude was again subject to the Duke's right of deer hunting; and that, when the Duke hunted, he was bound to give notice of this, so that the ground may be cleared of the cattle at the time the Duke hunted thereon.—Robertson *v.* Duke of Atholl, 2d May 1798, p. 54.

— of Common.—Two proprietors



had their estates marching with each other. The one claimed a servitude of common for pasturing his cattle and casting fuel, feal, and divot, upon ground claimed exclusively by the other. A declarator was brought to have such right of servitude set aside. Circumstances in which it was held that he had no right of common on the grounds in question.—*Rutherford v. Stormonth*, 25th July 1803, p. 515.

SERVICE.—*Vide* Devolution Clause.

SIGNATURE.—In a dispute about the property of the coal, the clause "*cum carbonibus et carbonariis*" appeared to have been interlined and inserted into the signature, for the crown charter after it was revised, and it thus appeared in the charter that followed thereon. This was afterwards held as an interpolation.—*Anderson v. Cadells*, 27th July 1803, p. 532.

SOCI CRIMINIS.—*Vide* Divorce.

STAKE NETS.—*Vide* Salmon Fishing.

SUBMISSION.—Held in an action brought to ascertain the property of certain grazing grounds, it appeared that the parties had, many years before, submitted these disputes to arbitration. Held that the decree arbitral pronounced in this submission, and which settled these disputes, must have effect, and be held as final.—*Robertson v. Duke of Atholl*, 2d May 1798, p. 54.

— A submission contained a provision for an oversman, in case of difference of opinion; and it also gave power to the arbiters to prorogate. They differed in opinion, and the dispute coming before the oversman, he prorogated the submission. In a reduction of his decree, on the ground that he had no powers to prorogate. Held, that the powers of prorogation given to the arbiters must be held to have devolved on the oversman when the arbiters differed in opinion.—*Glover v. Glover*, 11th Feb. 1805, p. 655.

SUCCESSION.—*Vide* Heirs Male.

SUMMONS.—Objections were stated to a summons of removing, that it was not signed by the clerk of court, but merely by a procurator of court; and also, that the citations were not executed by a sheriff-officer of court, but by a messenger-at-arms, without any authority to act as sheriff-officer. Circumstances in which these objections repelled.—*Finlayson and others v. Innes*, 28th Feb. 1803, p. 443.

SUNDAY.—No legal obligation attaches for work done on Sunday.—*Easton, Frazer, and Co. v. Brown and others*, 3d April 1798, p. 39.

SUPERIOR and VASSAL.—(1.) *Vide* Real Burden and Pre-emption Clause.

— (2.) *Vide* Damages, (3.)

TERCE.—Held, that terce could not extend over subjects held burgage.—*Sir Wilfred Lawson v. Maxwell*, 7th April 1803, p. 464.

TRANSFER.—*Vide* Trust, (2.)

TRUST.—(1.) Circumstances in which a factor for trustees on a private trust, who was also a trustee, was to be presumed as having acted with the concurrence of the trustees in abating £199 of penalties accumulated in an adjudication in a debt due to the trust, and which he recovered and discharged, and action raised against the owner of the estate on which the debt was constituted, twenty-five years thereafter, dismissed, reversing the judgment of the Court of Session.—*Douglas v. Murray and others*, 29th December 1797, p. 4.

— (2.) Bank stock having been transferred by the father in the son's name, although the father continued to uplift the dividends. Question, Whether they were the property of the father or the son? Held, as in a claim of legitim, that they were to be considered in this case as the property of the father, and that the declarations of the father and deposition of the son were evidence, as in a question with third parties, to prove a trust in the son.—





